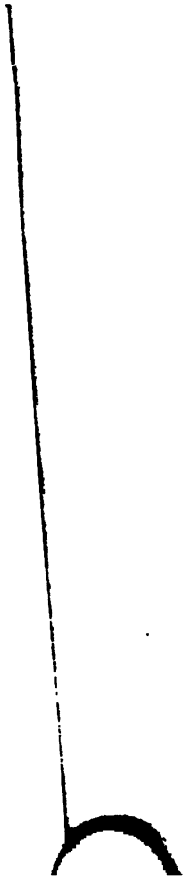

MANUAL

OF THE

LAW OF SCOTLAND.

By JOHN HILL BURTON, Advocate,
Author of a Treatise on the Law of Bankruptcy, Insolvency, and Mercantile Sequestration in Scotland.

THE LAW OF PRIVATE RIGHTS AND OBLIGATIONS.

Second Edition, Enlarged.

EDINBURGH:
OLIVER & BOYD, TWEEDDALE COURT.
LONDON: SIMPKIN, MARSHALL, & CO.
MDCCCXLVII.

ENTERED IN STATIONERS' HALL.

Printed by Oliver & Boyd,
Tweeddale Court, High Street, Edinburgh.

ADVERTISEMENT.

THE present volume embraces those portions of the original edition of "the Manual of the Law of Scotland" which relate to the private rights and obligations of individuals, whether arising from contract or from the operation of the law. Some additions have been made, embracing departments which had been either overlooked or but partially attended to in the first edition; and an effort has been made, by noticing the substance of recent legislation and the principles of late decisions, to carry the law down to the present day. The general scope of the volume relates to property and its tenures, the domestic relations, succession, contracts, and transmissions; the remedies for the fulfilment of obligations, the law of debtor and creditor, and the commercial code in general.

In some departments of the book the Author has made occasional references to his more elaborate and detailed work on the Law of Bankruptcy in Scotland, which the reader will understand as merely a brief method of citing the authorities which may be found at length in that book, in support of the principles embodied in the abridged compilation.

The Author has prefixed to the volume a notice of the History of the Law of Scotland, the sources whence it is derived, and the literature in which it may be studied, calculated, he hopes, to be useful to the student in the absence of any more full and authoritative work on this important subject.

EDINBURGH, *April* 1847.

CONTENTS.

INTRODUCTION.

ON THE SOURCES AND DIVISIONS OF THE LAW.

PART I.

PERSONS IN THEIR RELATIONS TO EACH OTHER.

PART II.

THE VARIOUS CLASSES OF PROPERTY AND THEIR RESPECTIVE TENURES.

PART III.

SUCCESSION.

PART IV.

OBLIGATIONS AND CONTRACTS.

PART V.

THE CONTRACT OF SALE.

PART VI.

CONTRACTS INVOLVING COPARTNERSHIP.

PART VII.

CONTRACT OF INSURANCE.

PART VIII.

CONTRACTS OF SURETISHIP.

PART IX.

CONTRACTS OF TRUST AND SERVICE.

PART X.

THE CONTRACT OF LETTING AND HIRING OF PROPERTY.

PART XI.

BILLS OF EXCHANGE AND OTHER NEGOTIABLE OBLIGATIONS.

PART XII.

SECURITIES.

PART XIII.

INSOLVENCY AND BANKRUPTCY.

PART XIV.

LEGAL REMEDIES.

MANUAL

OF THE

LAW OF PRIVATE RIGHTS.

INTRODUCTION.

ON THE SOURCES AND DIVISIONS OF THE LAW.

SECT. I.—*Statutes.*

THERE is a material difference between the old Scottish acts and those of the British parliament since the Union, both in their nature and their authority, and they require separate consideration.

Scottish Acts.—The era at which the acts of the Scottish parliament, still in force as statutes, commence, does not go so far back as the debatable periods in the history of Scottish legislation. Acts of parliament were undoubtedly passed long anterior to the date of any statutes which are now in force, or have been cited as authority by any of our institutional writers. The earlier parliaments acted as a great assize or high court of justice, and the proceedings on questions of private right were mixed up with those on public polity. But so early as the commencement of the fourteenth century, records of proceedings have been preserved which have every title to be considered acts of parliament, in as far as they embody the resolutions of the Estates of the realm in parliament assembled regarding matters of general law and public polity;[1] while there is every reason to believe that

[1] See Mr Innes's Preface to the first volume of the collected edition of the Acts of Parliament of Scotland.

public acts, of which the records cannot now be discovered, and which are only handed down to us in mutilated fragments, were passed by the parliaments of the preceding century. The erudition and industry of our modern juridical antiquaries has probably now brought forth all that the world is likely ever to know of these vestiges of our early statute law; and however little of it may be living in our practice, we certainly have at this day an opportunity of being better acquainted than our ancestors during the reigns of the Stuarts, with the laws passed under the preceding dynasties of kings. To the student who examines the laws of his country from their source downwards, these fragments, now so well arranged and so fully explained by introductions and comments, are matter of great interest. The legal practitioner may even in some cases be able to reflect light from them on disputed interpretations of the older subsisting statutes or the peculiar feudal usages of the kingdom, but they are not, in the modern practical sense of the term, Acts of parliament, having authority as laws of the realm simply because they are the declared will of the supreme legislative power.

The older editions of the Scottish statutes in use among lawyers, and the second volume of the large edition published by the Record Commission, commence with the reign of James I., the period to which the representation of the small freeholders in parliament owes its origin. That king had spent great part of his life in England; the laws and customs of our southern neighbours began to be studied; and it is likely that the advantage of making the acts of parliament an enunciation of distinct directory propositions, guarded by punishment for transgression, was then substituted for the looser method of the old proceedings, which were a mixture of the legislative, the judicial, and the executive. The oldest act now in practical force is the eleventh of the parliament 1424, "Of Cruives Zaires and Satterdaies Slop," as continued and interpreted by the act 1477, c. 73. In 1449, the important act by which the rights of lease granted to agricultural tenants are made effectual against the successors of the granter was passed, and the act establishing the long prescription is twenty-five years later in date. Thus we find enacted at this early period some of those statutes which are still in force as essential elements in our law. But it must be kept in view that another circumstance besides their mere enactment has given them this position. They have been, according to the tech-

nicality of the law, *in viridi observantiâ*. They derive their authority as law, not only from the circumstance of their having been passed by the legislature, but from that of their having been brought down to our time by an uninterrupted train of practice. From this double sanction which is required for our old statute law, we have thus in Scotland the peculiarity that our acts of parliament may be repealed by desuetude. It might seem at first sight that the acts of parliament have thus no better position than that of consuetudinary laws, whose terms are not to be found in their first promulgation, but in the form in which they are delivered to us by the decisions of the courts, and the commentaries of the jurists: but this is not strictly the case, for whenever a statute is appealed to, the words of the statute must be the foundation of the law, and the comments or decisions can only be taken as interpretations of its meaning. It has certainly, however, in some cases happened that a meaning has been attributed by the courts to a statute, which has at a later date been discovered to be a false one; and if a long practice has established the misinterpretation as rooted and established law, the court has seldom thought fit to vitiate the old established practice by sanctioning the new interpretation.[1]

These principles will be seen to be very distinct from those of the practice of the statute law of England, where an act which has once become part of the statute book, however long it may have been neglected, is at any time liable to be enforced if it have not been expressly repealed by some later statute. The lax manner in which the Scottish statutes were carried through parliament may have been partly the cause of their not having been strictly interpreted by the courts. When a British act of the present day is passed, it is presented to parliament in the form of a Bill word for word as it is to stand when passed into an Act. If there should be differences of opinion as to the precise wording of particular clauses, these are all settled in committee; and being adjusted and written out, the whole document is laid before the house, who either pass or reject it. The act when passed thus contains the very words in which it received the assent of parliament. But in Scotland the acts were drawn up, after the substance of them had been passed, by the Lord Clerk Register, and thus it was open to

[1] See in Gibson *v.* Forbes, 9th July 1833, Lord Fullerton's opinion, shewing that the meaning of the act 1696, c. 5, had been misunderstood during a long series of practice.

doubt whether they correctly expressed the will of parliament on the matter on which they intended to legislate.[1]

British Acts.—The statutes of the British parliament are of three classes, Public General, Public Local, and Private Acts. In their quality as laws there is no difference between the first and second class, and they are only distinguished by being separately printed and separately numbered during each session. This separation is a matter of comparatively late arrangement, and is found on looking back to the statute book to have been first practised in the 38th Geo. III. (1798). Before that time, the chapters were consecutively numbered as they were passed, without distinction between general and local. To prevent confusion, it is usual to refer to the public general statutes by the Arabic numerals (as 2 Vict. c. 88); and to the public local statutes by Roman numerals (as 2 Vict. c. LXXXVIII). The public local statutes of a session now occupy about four times the bulk of the general acts, and constitute a branch of our law increasing with such rapidity, that each session gives birth to an amount of legislation scarcely smaller than the whole extent of the statute law at the time when Bacon complained of its unwieldy bulk.[2] The chief

[1] There is no doubt that at a very early period a similar defect characterized the English statute law. During the reigns of the earlier Edwards, the practice in passing laws was for the parliament to petition and the king to assent, and the substance of the petitions and assents was at the end of a session rendered into a statute of so many chapters by the judges. The Commons occasionally complained that laws thus made their appearance on the statute book to which they had never consented. Thus the act 5 Rich. II. st. ii. c. 5, was the object of a declaration by the Commons to the effect that they had not given their consent to it. So early, however, as the reign of Henry VI., the plan of having the bill previously written out, and then passing it into a law—the only means by which it can be known whether every sentence and word is adopted by the legislature—came in practice. As appropriate to this matter, it may be observed that the notions regarding the royal assent were very different in the two countries. In England it has always been viewed as that sanction by the third estate in the legislature which is necessary to convert the bill into a law; and though there has been for upwards of a century no instance where it was withheld, and no such incident is likely ever to occur, a bill without the Assent is not law according to the British constitution. In Scotland the king performed the formality of touching each act with the sceptre; but this appears rather to have been an acknowledgment on his part that the statutes were laws of the realm, than an act of assent converting them from mere unauthorized drafts into binding laws. In Scotland the royal influence on the legislation of parliament was exercised in the earlier stages of measures, through the Lords of the Articles; and it has been held, that even if the king failed to touch with his sceptre an act which had passed the estates, it would still be law.

[2] It is sometimes of great importance to the practitioner to have the means of referring to local acts, and it is perhaps not generally known that in 1840 a very full index, according to the names of places, was

objects of Local legislation are the Police of towns, Turnpike and Commutation roads, Bridges, Harbours, Railways, Canals, Insurance companies, and other Joint-stock works and Public Companies. As they are presumed to affect private parties in their privileges and property, and not to be matter of general public interest, both houses of parliament have from time to time passed certain standing orders embodying preliminary rules as to advertisements and notices, which must be complied with before such acts can pass through the usual stages of parliamentary measures. From this circumstance, local acts cannot be passed with the same rapidity as public general statutes, and on one or two occasions, where important interests were at stake, measures properly of a local character have been passed as public general statutes for the sake of expedition. A plan has been lately adopted, which it has been supposed may in some measure curtail, or at least check, the accelerating increase of the future proportional amount of local legislation. All acts relating to certain specific matters, *e.g.* railways, turnpike roads, &c., have or ought to have a certain set of clauses to the same effect. Some public general statutes have been passed embracing these clauses; for instance, the 8th and 9th Vict. c. 33, is an act "for consolidating into one act certain Provisions usually inserted in acts authorizing the making of Railways in Scotland." During the same session, two other statutes of the same description were passed, called "The Lands' Clause's Consolidation (Scotland) Act;" and "The Public Companies' Consolidation (Scotland) Act."

It is a rule derived from the long established practice in England, already alluded to, that a public act of the British parliament does not fall into desuetude, and that parties having an interest to do so may at all times insist on its literal fulfilment. As language, even that of an act of parliament, is not always a perfectly transparent medium, the real meaning of the terms of a statute is of course frequently a matter of dispute, and a long series of decisions, chiefly in the English courts, is held to have permanently fixed the force and effect of certain forms of expression when they are used in acts of parliament.[1] It has occasionally occurred that statutes being drawn with reference to English practice

printed by order of the House of Commons, as applicable to all the local acts from 1798 to 1839 inclusive. The local acts of the earlier sessions will be found in the indexes to Ruffhead's edition of the Statutes at Large.

[1] For an account of these, see Gael's Practical Treatise on the Analogy between Legal and General Composition.

are not easily applicable in Scotland without resorting to a very wide interpretation of their meaning; and on some occasions, where it is evident that a clause is intended to be enforced in Scotland, effect has been necessarily denied to it, because the terms employed were incapable of any practical application to our institutions. Thus, by 52 Geo. III. c. 93, it was enacted that an appeal might be had from the decisions of certain justices to "the Justice Clerk, or any other officer of the Court of Justiciary, of the shire, stewartry, city, liberty, or place, in Scotland." These terms were found by the Court of Justiciary to be so inapplicable to our judicial tribunals, that the clause could not be enforced.[1]

Private acts are in a different position from either the public general or public local statutes. They are mere obligatory documents, like contracts with clauses of registration, or the decisions of courts, which no judge is bound to interpret as the public known law of the land, but which must be specially pleaded by the party demanding benefit under them, before they can be enforced.

SECT. II.—*Traditional, Judicial, and Institutional Law.*

Old Customs.—It is usual for jurists to divide laws into Written and Unwritten, a distinction which is perhaps more fully expressed by the terms Legislative and Consuetudinary. The former consist of the rules laid down by one or more persons possessed of legislative power,—the latter are created by custom and general practice, and have their sanction as laws in being enforced by the established judicial tribunals. In the present day, the Statutes represent the written law, the legal Treatises and the Decisions of the courts the unwritten. In the early history of our legal system the distinction is not so complete. There are several venerable collections of laws which partake of the nature both of legislative acts, and consuetudinary laws growing out of systematic usage and collected together into a general digest by some compiler. Such collections of laws appear to have sometimes been acknowledged by parliamentary or other authority, and afterwards to have received additions and alterations from subsequent compilers; while some of them are general compilations, of such laws, whether passed by parliamentary authority or arising from custom, as have been in force at the date of their collection. Around the provincial customs in which our rude and early laws had their origin, the pro-

[1] Shanks v. Neilson, Swinton's R. i. 617.

gress of learning and refinement brought additions from other sources, the chief of which were, the civil law—whether as contained in the old Roman sources, or amalgamated with the canon law, and the feudal practices of continental Europe. In England, the system of law supposed to be of peculiarly national growth, was distinguished from that supposed to be imported from the Roman and canon laws, by being called "the Common law." We sometimes use this term in Scotland as a convenient expression applicable to our whole unwritten law, but it does not possess with us the same technical meaning which it has long enjoyed in England, as expressive of a system which had peculiar courts to enforce its principles, while other and distinct tribunals, using the civil and canon law, gave relief from their strictness, or adjudicated in those matters to which they were too broad and inflexible to accommodate themselves. Though the supporters of the common law long boasted of its purity from what they considered the contaminating principles of the jurisprudence of Rome, there is no doubt that their system insensibly adopted many of its principles from the Civil law. The distinction thus kept up, however, has given a peculiar aspect to the administration of justice in England, and to the tone of the professional mind. The English lawyer is tempted to look on a uniform system, administered by one set of courts, as an anomaly, and hence professional writers, describing the Court of Session, denominate it "a court both of law and equity," a division which in this country, in common with the rest of Europe, appears to be a distinction without a difference.

There is no doubt that the extent to which the Roman or Civil law has been incorporated with the law of Scotland, has given it a greater resemblance to the codes of the majority of European states than it has to the Common law of England. Down to a comparatively late period, it has been usual to say that the Civil law is part of the law of Scotland, but this can only be true of those portions which have from time to time been incorporated with it. When a principle has been avowedly derived from the civil law,—in the case of a question occurring regarding its minute application, it is competent to search the fountains and the interpreters of the Roman law for dicta applicable to the case, and if there be nothing in our own law to the contrary, to give effect to them. Thus, in a late question as to the evidence of filiation, the civil law was referred to as fortifying a general rule, which was accordingly confirmed.[1] In another case, elaborate references were made to the civilians, for the purpose of

[1] Kirkpatrick v. Donaldson, 2d June 1843.

fixing to the particular circumstances, the application of the doctrine of legitimation by subsequent marriage, which had long been admitted into the law of Scotland.[1]

Among the early collections of Scottish law above alluded to, are the "Leges quatuor Burgorum," or Laws of the four Burghs; the "Statuta Gildæ," likewise a collection of burgal institutions; the more comprehensive collection called the "Regiam Majestatem;" and the "Quoniam Attachiamenta," a collection relating to forms of process, receiving its name like the Regiam Majestatem from the words with which it commences. In the very oldest statements of the actual existing law, which may be carried back to the reign of David I. (1125-1153) there are references to still older systems, under such titles as "Assisa Terræ," "Lex Scotiæ," &c.,[2] the origin and progress of which cannot be traced. It is worthy of observation, however, that many of the terms occurring in our older law, are identical with those made use of in the earlier law of England, and are still in some shape employed south of the Tweed, while with us they have, along with the practices they embodied, been long disused—such for instance are the terms Alderman, Borough-reeve, Coroner, &c. To explain this circumstance, we have only to remember that national jealousies and enmities between England and Scotland were the fruit of the attempt of Edward I. to subjugate this country, and of the subsequent war of independence. Anterior to these events, the lowland population of Scotland at large were no more severed from the people of England by customs, institutions, language, or interests than those of Lothian from those of Fife, or the inhabitants of Northumberland from the people of Lancashire. In both countries the common people—the tillers of the ground and the inhabitants of the cities—were of the same Teutonic race, and spoke a language which the literature of the day leads us to believe was more nearly a common tongue than it is at present. In both, the courtiers consisted of the descendants of the Norman adventurers who had entered England with King William; and it may readily be believed that the gradual influx of these aggrandizing soldiers into Scotland, where they obtained additions to their English fiefs, if it tended to keep up the amalgamation of the aristocratic population of the two countries, gave the Scottish Saxons who were depressed by their predominating in-

[1] Kerr *v.* Martin, 6th March 1840. Riddell's Inquiry into the Law and Practice in Scottish Peerages, p. 524.
[2] Innes's Preface, p. 30.

fluence, a bond of sympathy with those English neighbours who were still more severe sufferers from the same cause.

Of the Leges Burgorum, Mr Innes says: "Although David has been usually called the creator of the privileges of the Scotch burghs, it is impossible to consider this code as arising from a single act of legislative policy. It evidently contains the result of much experience of the objects and the difficulties of burgal administration; and while some of the fundamental principles, especially regarding the election of magistrates, may be traced through the constitution of the free towns of the continent, back even to those cities which enjoyed their own privileges under the despotism of the Roman empire, and preserved them after its downfall; the collection is perhaps rather to be viewed as part of a great Saxon movement which was taking place simultaneously over all Britain. It is hardly necessary to observe, that no feeling of hostility yet interfered between the two countries to prevent the inhabitants of lowland Scotland and of England, kindred in blood, language, and manners, from adopting together the steps of a system which opposed to the oppressive power of the Norman nobles the union of numbers in each town, and the combination and mutual support of the trading communities of the whole island." [1]

The Regiam Majestatem, the earliest work professing to give a comprehensive digest of Scots law, was long believed to be an authentic code coeval with David I., but it has been proved to be very nearly a copy of the "De Legibus et Consuetudinibus Angliæ," a work on English law attributed to Ranalph de Glanvil, justiciar of England during the reign of Henry II. The Scottish version appears to have been prepared with the view of supplying the deficiency in the records of the law, caused by the destruction or removal of documents during the wars with England; and that a work, nearly a transcript of an English law-book, should have been considered suitable for such a purpose, shows how little of marked national distinction had existed between the institutions of the two countries.

The later Institutes and Treatises.—After the Regiam Majestatem, no general compilation of Scots law appears to have been made, until in the latter half of the fifteenth century Sir James Balfour collected his "Practicks," which remained in manuscript until 1754. They consist of a series of pro-

[1] Preface to the Statutes, p. 83.

positions, or announcements of the law, collected from the older compilations which have just been alluded to, from the acts of parliament, and from the decisions of the courts. The work is very seldom referred to at the present day for practical purposes.

The "Jus Feudale" of Sir Thomas Craig was published in 1655, several years after its author's death. It is the earliest Scottish law-book which is still occasionally referred to in practice, as containing the definition, of such of the principles of our law recognised at the time when it was written, as have survived to the present day. Craig in some measure stands on higher ground than that of an arranger and promulgator of the mere contemporary law of the land, and is the highest authority, which this country at least has produced, on the original fundamental principles of the Feudal system. He was brought up in a foreign school of jurists, who had learned to overlook the peculiar laws and customs of individual countries, and to draw their wisdom from the two great fountains of European jurisprudence—the Roman law and the Feudal customs. While his work has thus an air of scholarship and wide reading, it contains less information regarding the peculiar laws and institutions of Scotland, than a writer of more contracted genius might have afforded.

In 1681, James Dalrymple, Lord Stair, published his "Institutions of the Law of Scotland," a work still of daily reference in practice, and which should be carefully examined and digested by every student. Its practical value to the lawyer of the present day is evinced by two editions of it having appeared within the past few years, with such notes and additions as are necessary for exhibiting the alterations made by a century and a half on our laws. The appearance of this work marks an epoch in Scottish legal literature, and no other book contains so much that, though still held as law, is there announced for the first time. The power of generalizing principles from individual facts, is a quality that to the legal commentator should be always present, while it should never be conspicuous. It should exercise itself in seeing the prominent and ruling features of the law—in separating what is permanent and important from what is secondary—and in putting everything in its right place—not in disquisition and theoretical deduction. Hence the weight and value of this great work. Its author was a philosopher and scholar, and had worked largely in the more theoretic departments of mental science; but he knew that the business of the law lay with practical details, and his

philosophical acquirements only enabled him with more distinctness to keep in view the reference of legal principles to the actual affairs of life.

The concluding years of the seventeenth and the commencement of the eighteenth century produced several minor legal works, among which Sir George Mackenzie's "Institutions of the Law of Scotland," published in 1684, may be ranked. It is too meagre for a practical law-book, and contains too much that is obsolete to give the student a profitable initial view of the outline of the law. In 1751 and 1753, Macdouall, Lord Bankton, published his "Institute of the Law of Scotland," in three volumes folio. This work is discursive and speculative—entering into many comparisons between the law of Scotland and that of England. It is seldom referred to at the present day, and never took rank as a high legal authority. Professor Erskine's "Principles of the Law of Scotland" were published in 1754. This work is remarkable for its terseness and clearness—the absence of all lengthy disquisition, and the lucid order in which the several principles of law are presented. The well known larger "Institute of the Law of Scotland," published in 1773, was the posthumous work of the same author, and not having received his latest revisal, does not exhibit the same symmetry and finish as its predecessor. Although it has, however, probably not reached that perfection to which its author might have brought it, it is undoubtedly the law-book which is most read and most referred to. It has passed through many editions, and received the additions necessary to complete it as a modern law-book from an eminent lawyer now on the bench. There is no intention, on the present occasion, of proceeding to an analysis of contemporary law-books, but in a sketch of the phases through which our juridical literature has passed, it would be unjust to leave unnoticed the labours of the late Professor Bell. With the commercial, manufacturing, and agricultural progress of the country, new classes of transactions had risen up, new applications of legal principle were necessary; and the public as well as the profession of the law felt the want of some leading mind to arrange and digest these fresh juridical materials, which were gradually assuming a wide importance, and leaving in comparative insignificance some of the more prominent portions of the old law authorities. The success with which the task was accomplished is attested by the respect with which Professor Bell's Commentaries have been treated by his own profession, as this extensive work was presented to them in

its several editions; and it thus constitutes the Scottish law-book of modern times which has brought together the greatest quantity of lucid and systematic matter from undigested materials.

The position which legal treatises hold as authoritative announcements of the law is not easily defined. In the first place, no dictum of a commentator or digester of the law, however high his reputation, can be stated on that account to be law, and indeed the position of being binding law, like the clauses of an act of parliament, is not even conceded to the principles embraced in the decisions of the supreme court. There are at the same time legal propositions, to be found only in the institutionalists and commentators, which are as firmly established law as any provisions in an act of parliament. This arises, however, from its being known or believed that the author has merely given words to old established principles, the acknowledgment of which as law goes back to remote and perhaps unknown ages. The older is the law-book, the greater quantity of superseded law will it in general be found to contain; but at the same time those principles which are still in daily practice, and have continued to be acknowledged since the book was published, are to be found in more authoritative form in these ancient announcements than in modern versions.[1] It is generally said that no writer is an authority until he is dead; but the real principle at work is, that the dictum of a lawyer, to be absolutely admitted as fixed law, must have stood the test of a certain period of practice. In modern books, which are of small authority, there is more actual practical law than in the old institutionalists; but whatever in the writings of the latter is still matter of practice, is more authoritatively stated by them than by modern writers. Between these two extremes the strength and applicability of legal dicta vibrates, and some are in their transition from being merely statements worthy of respect, to be either superseded, or to become fixed principles of law. It would at once be an absurd and dangerous rule, that every one who writes a law-book is to be held an authority on law; but at the same time it is a general principle, that the court rejects no light which may be brought to bear upon the law it is about to embody in a decision;

[1] English writers feel this principle so distinctly, and their system professes so much respect for whatever is old and fixed, that modern law-writers, when laying down the ancient established principles of the law, scarcely vary from the very words in which they have been laid down by Coke, or at latest by Blackstone.

and elucidations obtained from impartial commentators may be at least as clear as those derived from lawyers whose duty it is to work for the interests of their respective clients. In this view, appropriate remarks made by persons who are not professional lawyers; the proceedings of the legislatures of other countries; the decrees of foreign courts; and treatises on other laws and institutions, may all be brought to bear on the proper application of the general principles of law. In applying the rules of international law, and in those mercantile questions to which it is so serviceable to commerce that a system of law as nearly uniform as is practicable should be adopted throughout Europe, the law-books of other countries—particularly of England, France, and the United States, are sometimes of great service.

Decisions.—Of the decisions of the Court of Session, the earliest recorded in print are to be found in Balfour's Practicks. Some of the cases which he narrates are indeed anterior to the present constitution of the court, and bear to have been given before the close of the fifteenth century. In Morison's Dictionary, several decisions bearing date during the sixteenth century and the earlier part of the seventeenth, have been collected from manuscripts. The earliest published collection of decisions is the folio volume by Gibson of Durie, from 1621 to 1642. The decisions of the court continued to be collected on the responsibility of individuals, until the Faculty of Advocates took the system of reporting under their patronage. In 1705, the faculty gave a salary to a reporter, and "Forbes's Journal of the Session," published in 1714, was the first fruit of this patronage; but it was not till the year 1752 that the series commonly called "The Faculty Collection" commenced.[1] This series was conducted by successive reporters until 1841, when the field was left to public competition. The tendency of the system at the present day has been towards an increase of the length of the reports. The opinions of the judges, sometimes occupying a large space, are generally given at length, and they may be looked upon as so many detached legal treatises. It is the reporter's peculiar duty so to connect the decision come to with those facts in reference to which it was pronounced, as to derive from the union a general legal principle. This is generally embodied in an analysis of the report, supplying the place of all that the older reporters used to afford. The valuable

[1] In Tait's "Index to the Decisions," a work of great value in economizing time to those who are in the habit of turning up many decisions, may be found a full bibliographical account of the various reports.

analysis of the reports during the present century, embodied in Mr Shaw's Digest, is of inestimable service to those who are searching for decisions in reference to particular points, and who desire to have the principles of all the decisions on any one branch of the law laid before them at one view. To the admissibility of any particular decision as an authority to the court to administer its principle as fixed law, two objections may lie—the one, that it is not rightly reported, and the other, that it is not in conformity with law. As decisions recede into antiquity, any ground there may be for holding the former objection will generally become less and less substantial, but at the same time the decision will be becoming less applicable to modern occurrences. A single decision of the Court of Session is not necessarily admitted as embodying the law, though it is very strong evidence of what the law is, and a series of decisions in favour of any one principle will approach within an imperceptible distance of being a fixed embodiment of the law. When there is but one decision in favour of any principle, it is open to show that it has proceeded on mistaken views—in some instances it has been shown that a decision has rested on a mistaken reading of an act of parliament; but a whole series of connected decisions are so nearly conclusive evidence of what the law is, that they may be said to make it.

PART I.

PERSONS IN THEIR RELATIONS TO EACH OTHER.

CHAPTER I.

Husband and Wife.

Sect. 1.—*Constitution of Marriage.*

In conformity with the civil law and the custom of the greater part of Europe, marriage is in Scotland merely a civil contract between the parties.[1] Our law on this point differs materially from that of England, where a sufficient marriage requires by statute to be celebrated with certain solemnities.[2] It is essential to the existence of a marriage that by the terms of the contract it is to commence at the moment when the contract is entered into; so, an obligation to hold a marriage as contracted at any future period is a mere promise of marriage, which cannot by any process of law be converted into a marriage,[3] but may afford ground for an action of damages for a breach of the promise.[4] On the same principle, a declaration of marriage, however distinctly applicable to the present time, if it incorporate words which make it conditional, is insufficient—as where the man wrote to the woman thus, "you and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, *in the event of a child being born in consequence of the present connexion betwixt us.*"[5] It has sometimes however been necessary, where the meaning of written documents

---

[1] E. i. 6, 2. Br. St. 25, n. Aitchison *v.* Solicitors at Law, 20th November 1838. Adam *v.* Walker, 24th May 1813. 1 Dow, 148.—[2] Bl. i. 439. 26 Geo. II. c. 33.—[3] E. i. 6, 3. Fraser on the Domestic Relations, i. 152.—[4] 59 Geo. III. c. 35, § 1.—[5] Stewart *v.* Menzies, 6th October 1841. 2 Rob. App. 547.

was equivocal, to gather from other circumstances the intention and view with which parties subscribed or wrote them.[1]

By a practice also derived from the Roman law, a promise of marriage, if followed by connexion between the parties, constitutes a marriage, which may be judicially declared to exist by a decree in an action of declarator.[2] The promise to have this effect must be in writing, or admitted by the oath of the party,[3] or proved by circumstantial evidence, *i. e.* "by a train of conduct and proceedings, leaving no doubt that there was a serious matrimonial purpose in view at the time."[4] The promise must not be *conditional*, as, a promise to marry in the case of a child being born; but absolute.[5] It is not yet decided whether such a marriage while undeclared by a decision of the court, will hold so as to prejudice a subsequent marriage formally solemnized.

The agreement between the parties to consider themselves man and wife may be proved in the ordinary manner by writing or witnesses, or it may be held to have taken place where there is a serious and deliberate acknowledgment by the parties of the existence of a marriage.[6] As in other cases of evidence, words and actions are here given effect to only in as far as they are considered to be the indications of intentions or professions, and so words or expressions will not suffice, if it appear that, however clearly they may indicate a marriage, they were used by parties not intending to consider themselves man and wife.[7] In Hamilton's case, there was conflicting evidence as to the ostensible position which the parties held to each other. The husband was a decayed gentleman, with some pride of family and station, and he concealed altogether from his relations and his friends of the upper class any circumstance indicating his being married, while among poor people, of the same rank as the mother of his children, he seemed to encourage the opinion that he was married. The marriage, as sanctioned by a decision in favour of the legitimacy of the children, rested, not on the evidence of habite and repute, but on the circumstance that "to please and satisfy their mother," and also as

[1] Edmestone *v.* Cochrane, 15th May 1804. Inglis *v.* Robertson, M. 12689. Fraser, i. 136, *et seq.*—[2] E. i. 6, 4. Ferguson's Consistorial Law, 115. Fraser, i. 164, *et seq.*—[3] Smith *v.* Grierson, 27th June 1755, M. 12391.—[4] Campbell *v.* Honyman, 9th July 1830. Harvie *v.* Inglis, 19th Feb. 1839.—[5] Fraser, 194. Stewart *v.* Menzies, App. 6th October 1841. 2 Rob, 547.—[6] E. i. 6, 5.—[7] Iv. Er. 120, n. 139. Br. St. 27, n. Fraser, i. 149. Aitchison *v.* Solicitors at Law, 20th Nov. 1838. M'Innes *v.* More, M. 12683, reversed on App. Fraser i. 213. M'Gregor *v.* Campbell, M. 12697.

it appeared to enable her to draw a military pension, he had written a letter acknowledging her to be his wife, which was deposited with his law-agent.[1] As in other contracts, that a party was intoxicated at the time of giving consent, and repudiates it on restoration to sobriety, is a ground for nullifying a marriage.[2] An intelligent consent, in the full knowledge of what is undertaken, is so essential to the constitution of marriage in Scotland, that it is held that even a marriage celebrated with the usual ecclesiastical solemnities may be null, if its absence be distinctly shown.[3] In one remarkable case, a certificate of proclamation of banns had been obtained by the alleged husband, though no proclamation had taken place. The parties went with it before a clergyman, who was subsequently banished for celebrating clandestine marriages, and the marriage ceremony was performed. It was denied on the woman's part, and was not proved on the man's, that there had been connexion. She said she had been concussed into the proceeding, but this was not proved, and she was twenty-six years of age. She went to live with her father. All the parties were of dissolute habits, and much rude familiarity was attested, out of which the man attempted to prove, but without success, that they had sometimes lived as husband and wife. She was afterwards regularly married to a young man, who had paid his addresses to her, and this marriage was acknowledged by the general conduct of the friends of the parties, and particularly by the person with whom the previous ceremony had taken place. It was not until she had succeeded to some property that this party claimed to be her husband. The House of Lords found, on the ground that the whole conduct of the parties showed that there was no deliberate intention to be married, that the earlier ceremony made no marriage.[4]

A very loose method of constituting marriage in Scotland is by inferring it "from cohabitation, or the parties living together at bed and board, joined to their being habite, or held and reputed man and wife."[5] The cohabitation must be in Scotland, and the repute that the parties are man and wife must be general, and not the opinion of but a few individuals.[6] It is, perhaps, more correct to consider that such circumstances are merely evidence of the existence of a

---

[1] Hamilton v. Hamilton, 22d Nov. 1839, affirmed 1 Bells App. 736.—[2] Johnston v. Brown, 15th Nov. 1823. Fraser, i. 48.—[3] M. S. xiv.—[4] Jolly v. M'Gregor, 3 W. S. 85. Fraser i. 219.—[5] E. i. 4, 6.—[6] Ferguson, 116.

marriage, leaving to a party impugning it the right of proving that a marriage did not exist. In these irregular marriages all circumstances must be taken into consideration and weighed.[1] Although it has been justly observed that before any inquiry can be founded as to the *repute*, it must first appear that the parties have been cohabiting as man and wife;[2] it having been ascertained that a marriage has once really existed, no subsequent conduct of the parties can tend to invalidate it.

SECT. 2.—*Who may Marry.*

Idiots, insane persons, and pupils, cannot lawfully marry.[3] It is said, however, that the marriage of a pupil may be validated by the homologation inferred in deliberate cohabitation after the period of pupillarity.[4] In the case of insanity, a marriage during a lucid interval may be valid, but if the person have been cognosced, the fact of a lucid interval will require special proof, unless the verdict be set aside by course of law.[5] A marriage is null where one of the parties had an existing spouse at the time of the marriage, though the other may have acted in ignorance of the fact. It is held for this reason to be expedient for a married person whose spouse has been absent for many years, and is supposed but not known to be dead, to obtain a decree of divorce for desertion before marrying again.[6]

Propinquity in relationship, if within certain forbidden degrees, bars legal marriage.[7] The act 1567, c. 15, by appealing to the limits, "as the law of God has permitted the samen," is understood to have incorporated the limitations of the 18th chapter of Leviticus into the law of Scotland, systematizing them according to the principles presumed to be there developed; for there are relationships, such as uncle and niece, which are not expressly prohibited by that chapter, but are so by the Scottish law. The general rule is, that all ascendants and descendants in the direct line are prohibited from intermarrying, and likewise collaterals where one of the parties is brother or sister to the direct ascendant or descendant of the other.[8]* It has to be observed that this rule rests rather upon the general under-

[1] Jolly v. M'Gregor, 2d Dec. 1825, App. 20th June 1828, 3 W. & S. 85. Farrel v. Barrie, 1st Feb. 1828. Adair v. Adair, 14th May 1829. Thomas v. Gordon, 8th July 1829.—[2] Lourie v. Mercer, 28th May 1840.—[3] E. i. 6, 2. Ferguson, 107.—[4] Fraser, i. 44.—[5] Fraser, i. 48.—[6] Fraser, i. 81.—[7] E. i. 6, 7.—[8] Ib. 8, 9. Ferguson, 107.—* For farther explanation of these terms, see Part III. Chap. I. Sect. 1.

standing of lawyers than on express decisions; the legal principle being so precisely identified with the social feeling of the country, that a sufficient number of breaches of the principle have not occurred to enable its practical boundaries to be marked.[1] The general rule is as broad in cases of relationship by affinity or marriage, that is, in the relationship between a person who has been married and the blood relations of the spouse;[2] but doubts are entertained of the extent to which this restriction would be carried in practice.[3] There is no restriction either theoretical or practical in a relation either by blood or consanguinity of one spouse marrying a relation of the other. Thus, if a son marry a widow, there is nothing to prevent his father, a widower, from marrying his son's step-daughter.

By an old statute a marriage between a person divorced for adultery, and the individual with whom the adultery was committed, is declared to be null, and the issue incapable of succeeding.[4] No case has occurred, however, in which a party has endeavoured to have such a marriage declared null; and as to the effect on the succession of the issue, the question seems to have arisen only in one old case, in which it was found unnecessary to decide it.[5]

SECT. 3.—*Solemn and Clandestine Marriages.*

Although marriage is in Scotland merely a contract in which the ability of the parties to consent to it, and their having actually consented, are all that are requisite to its validity; yet there is a particular method of solemnizing marriage, a departure from which renders the parties liable to penalties. In a solemn marriage, the banns must be proclaimed for three several Sundays in the parish church where each party resides.[6] Of the due proclamations, the certificate of the parish clerk is evidence, excluding proof, if it should be profered, that all the proclamations were made in one day.[7] It was until a late period necessary that the ceremony should take place before an ordained minister of the Church of Scotland, or an Episcopal clergyman who had taken the oaths of allegiance and abjuration.[8] In the latter case, it was and still is in the letter of the law necessary that the banns, besides being proclaimed in the parish church, should be proclaimed in the Episcopal chapel attended by the party.[9]

---

[1] See Fraser, i. 70, *et seq.*—[2] E. i. 8, 9. Ferguson, 107.—[3] Fraser, 74.—[4] 1600, c. 20.—[5] Douglas *v.* Douglas, 12th June 1670, Stair.—[6] E. i. 6, 10. Ferguson, 109.—[7] Ibid. 110.—[8] E. i. 6, 11.—[9] 10 Anne, c. 7, § 6.

The restriction against the clergy of other communions officiating was removed in 1834 by an act, which provided that marriages by Roman catholic priests, or other clergymen not of the establishment, should not subject the celebrator or parties to fine or other punishment, provided there had been due proclamation of banns.[1] From analogy as to the old exception in favour of the Episcopal communion, it might appear that the latter provision requires banns to be celebrated both in the parish church of each party and in the churches attended by them respectively, but no cases have occurred to show that this is necessary, and it is not conformed to in practice. The punishment incurred by the parties to a clandestine marriage belongs to the subject of criminal law. The danger of this law as an instrument of religious persecution has been removed by the act above noticed; and the question, whether the penalties have been incurred, will depend more on the religious ceremonies being complete or not, than on the quality of the person who performs them.

SECT. 4.—*Contracts of Marriage.*

It is usual in contracts of marriage, not only to make arrangements for the interest of the respective spouses, but to provide for the contingency of children of the marriage, either by destining to them existing property, or by engaging to make some particular provision for them. Such documents are in a great measure family settlements, and in that shape they are considered elsewhere. On the present occasion they will be viewed as contracts between the married parties, and their effect, as giving the issue of the marriage any right arising out of contract superior to that which they would enjoy as mere destinees in a family settlement, will be considered.

It is a general rule, that the dissolution of the marriage by death within a year and a day, without issue, defeats the conventional as well as the legal provisions arising out of marriage, unless there be a stipulation in the contract to the contrary.[2] Provisions to wives are frequently made by annuity, and such annuities have this peculiarity, that if there be no stipulation to the contrary they are payable in advance—an arrangement which provides them with the half year's aliment to which, as stated below, they are entitled in the absence of contract.[3] A policy of insurance is

[1] 4 & 5 Wm. IV, c. 28.—[2] E. i. 6, 38-40. See below, § 10.—[3] E. ii. 9, 67. Fraser, i. 755.

a usual method of providing either an annuity or a fixed payment to a surviving spouse. The obligation to pay the periodical premium will, in such a case be, in questions with creditors, in the same position with other pecuniary stipulations in marriage-contracts. When there is heritable property, a provision may be made by an annuity, on which there is an obligation to infeft. An annuity so provided to a wife is commonly called a Jointure; while, when instead of a fixed annuity, the wife is secured in the liferent of a particular estate, the provision is called a Locality. On entailed estates, provision must be made under the restrictions specially created by statute (*see Part* III. *Chap.* III. § 3). It is not unusual for the destination of estates to be made conjunct between husband and wife, with provision for the children or other subsequent heirs—the effect of these arrangements is considered in connexion with succession. It is a general rule, that in cases of doubt, and where there are not expressions to a different effect, the husband is fiar and proprietor both of the property which has come from his own side, and of the wife's tocher, and that it goes to his heirs.[1] Where the provision is to the spouses in conjunct fee and liferent, a spouse having a liferent by survivance is in the same position, and has the same ample proprietary authority, as one reserving a liferent to himself in the settlement of an estate. "It is considered as a limited fee or property rather than a liferent."[2] A common method of arranging the application of property in contemplation of marriage, is by putting it into the hands of trustees for the benefit of the respective parties. If the trustees obtain an absolute right of property, and the transference to them is not affected by the bankrupt laws, this description of settlement is, according to the principles stated below, the most effectual which can be made to preserve moveable property from the claims of creditors. Claims founded on the general legal rights arising out of the marriage may interfere with the disposal of the property by trust. Thus, where the wife had before marriage conveyed a fund to trustees, and her husband became unable to aliment her, the trustees were ordained to apply the interest of the fund towards alimenting her, instead of to the purposes of the trust.[3]

Questions with Creditors.—The main difficulties with which marriage-contracts have to contend, especially in regard to

---

[1] St. ii. 6, 10. E. iii. 8, 36.—[2] E. ii. 9, 42. Fraser, i. 809.—[3] Gibb *v.* Pitcairn, 8th June 1839.

the provisions for children, are in questions with creditors. By the act 1621, c. 18, all gratuitous alienations made by a debtor to "conjunct and confident persons," may be reduced at the instance of previous creditors.* It is held that a deed in contemplation of marriage is for "a true, just, and necessary cause," according to the terms in which the act defines the transactions against which it does not strike. It is pretty clear, however, that a transaction by which an insolvent person, under the pretence of executing a marriage-contract, should attempt to defeat the right of his creditors to attach his effects, would be treated as an evasion of the law. It is held, that when near relations of the parties to be married participate in an antenuptial contract, the obligations they incur are onerous, and do not come under the act. The provisions to children are only onerous against the father's creditors if the terms admit of payment of them being demanded during his lifetime. If, according to the terms of the deed, he does not become a debtor for the provisions, but they only fall to the children on his decease—they are successors, not creditors, and their claim cannot enter into competition with those of creditors, whether arising prior or subsequent to the contract. If interest is made to run from a period which may occur during the parent's lifetime—as the child's marriage or majority—the child is a creditor. The most effectual means of securing the interests of children is by conveying property to trustees for their benefit. By the other methods, the child is at best but a creditor, and unless he have obtained his provision, can only compete with the other creditors, drawing a dividend if the estate be divided under the bankrupt law.[1] A wife is in ordinary circumstances only a creditor for the provisions in the contract of marriage, and entitled to rank with the other creditors; and she can only have an absolute preference by property being vested in trustees for her behoof, or by being infeft in heritable property.

Postnuptial contracts are by the strict rules of law looked upon as gratuitous conveyances, although they have not generally been considered as open to the privilege of revocation mentioned in the seventh section. In provisions to wives in such contracts, the principle, as expressed in the decisions, is, that they are good "in so far as they do not exceed a reasonable provision;" but no rule is derivable from these decisions, by which the onerosity of such deeds can be tested, apart from the particular circumstances of each case.[2]

* See this discussed under the law of Debtor and Creditor.—[1] See the Author's Law of Bankruptcy, &c. p. 120-153.—[2] Ibid. 150-153.

Questions with Representatives.—In these the child who has a provision under a marriage-contract, if he have not an actual preference over a particular estate, has at least the privileges of a creditor; and his rights, though they may be postponed to those of the onerous creditors, are not liable to be defeated by gratuitous alienations by the parent.[1]

SECT. 5.—*Management of Common Property.*

After the marriage, the moveable property (*see Part* II. *Chap.* I.), which may have belonged to either party before it, or may afterwards accrue, is formed into a common fund, under the management of the husband.[2] The right of the husband to the administration is termed the *Jus Mariti.* It gives him the full right of a proprietor over the goods in communion. He receives payment of and grants acquittances for debts due to his wife, and he can sell and even gratuitously dispose of the estate at his pleasure, the right of property in the wife, if it can be called so, remaining dormant till the dissolution of the marriage.[3]

Exceptions.—There are slight exceptions to this rule. The wife's clothes or ornaments, termed *paraphernalia*, are not subject to the *jus mariti*, and so cannot be attached for the husband's debts,[4] and a sum may be secured to the wife, by herself before marriage, or by a stranger, from which the husband's right is excluded.[5] An alimentary provision to the wife, though it do not specially exclude the *jus mariti*, excludes the husband's creditors.[6] The husband may renounce the *jus mariti* over the whole or any part of the moveable estate.[7] This was formerly doubted, and it is still held that his renunciation cannot extend to "the entire renunciation of his right to act as the head of the family."[8]

Husband's Liabilities.—The husband, as vested with the moveable property of both parties, becomes liable to the corresponding obligations of both; and so, while the marriage lasts, he is liable for his wife's moveable debts, though contracted before the marriage. The wife is still nominally the debtor, but the husband is called in all actions as administrator of the goods in communion. At the termination of the marriage he ceases to be liable in this capacity; but, in the first place, whatever portion of the wife's share of the goods in communion remains in existence is still

---

[1] E. iii. 8, 38.—[2] E. i. 6, 12.—[3] Ibid. 13.—[4] E. i. 6, 15.—[5] Ibid. 14.—[6] Ibid.—[7] Ibid.—[8] B. P. 1562.

attachable for the wife's debts; and, secondly, if the husband has acquired property through his wife, *i. e.* property beyond an "ordinary tocher," the position of the parties considered, he is liable, to the extent to which he has profited, for all her debts heritable as well as moveable.[1] If the wife's heritable property have been conveyed to the husband by the marriage contract, he becomes liable for her heritable debts;[2] and in all cases he is liable for the interest of heritable debts, as being in character moveable.[3] If the husband turn his wife out of doors, he is bound for the debts she may contract for her subsistence, and tradesmen or other persons making corresponding furnishings to her, have recourse against the husband.[4]

Wife's Right of Management.—It is a general rule consequent on the *jus mariti*, that the wife cannot burden the common stock with debts contracted during the marriage, but the rule is subject to the exception of her *præpositura*, or right of administration in certain matters. She has a presumed *præpositura* in household matters while she lives with her husband, and her oath may be taken on a reference to prove a debt for furnishings.[5] The husband may restrict his liability for such debts by obtaining an inhibition against her by a petition to the Court of Session.[6] The *præpositura* of the wife may extend beyond household concerns, if sanctioned by a writing from the husband, or by her being in the management of any branch of business, as a shop, tavern, &c. In this respect she is simply placed in the position of an agent or manager.[7] It will not be presumed that by having a management confided to her, she is entitled to borrow money, and incur correspondent obligations.[8] (See Index, *Agent.*) The heritable property* of the wife does not come under the *jus mariti*, but the husband, in virtue of his curatory, has the right of administering it for his wife's behoof.[9]

Sect. 6.—*Husband's Curatory.*

The husband stands in the situation of guardian to the wife. In the general case he is entitled to direct her motions and pursuits, but his authority is to be used for the support

---

[1] E. i. 6, 17, 18. Fraser, i. 293.—[2] E. i. 6, 18.—[3] Gordon *v.* Davidson, M. 5789.—[4] Fraser, i. 319.—[5] E. i. 6, 26. Tait on E. 263.—[6] E. i. 6, 26.—[7] Ibid. Br. St. 31, n. Fraser, i. 310. [8] M'Intyre *v.* Graham, Hume, 203.—* See Part II. Chap I.—[9] E. i. 6, 27.

of domestic order, and not less for her advantage than his own; so he is bound to support her according to his rank and wealth, and must adopt the measures suitable to her comfort and health, as in an old case where the husband was bound to defray the expenses incurred by his wife, who was in bad health, visiting a watering place.[1] If the wife be deserted by her husband, she has, along with her action of adherence, an action of aliment.[2] By the Poor-law Act, when a husband deserts his wife so that she falls on the parish, he may be prosecuted criminally as a vagabond, and is liable to fine or imprisonment.[3]

Suits.—The wife is not personally liable at the suit of creditors, who must bring their diligence against the husband. No suit consequently can proceed against the wife till he have been cited as a defender for his interest; nor can the wife sue without the concurrence of the husband.[4] He, however, cannot sue in her name and right without her concurrence.[5] If the husband unreasonably refuse to concur, if he is mentally incapacitated, or if the action is by the wife against the husband, the court will appoint a curator in the cause.[6] When the action regards property so situated that both the *jus mariti* and the right of administration are excluded, it has been held that the wife may be a party without her husband's consent.[7]

All deeds by the wife, even though affecting her own heritable property, are null without the husband's consent, not only if executed after the date of the marriage, but if after that of the proclamation of banns.[8] But the power of repudiation may be renounced by the husband, or excluded in respect of any particular subject by the terms in which it is conveyed to the wife.[9] Her estate, however, cannot be attached for pecuniary obligations contracted by her during the marriage, even though they be with the consent of her husband, as they are of themselves essentially invalid.[10] There seems to be, however, an exception to this rule, in the case of any obligation incurred *in rem versum* of the wife, or applied to her own exclusive use, *e. g.* for the improvement of her estate.[11]

If the parties be permanently separated, the husband absent from the country, and the wife conducting a separate

---

[1] E. i. 6, 19.—[2] Ibid. 19.—[3] 8 & 9 Vict. c. 83, § 60.—[4] St. i. 4, 14, 15. E. i. 6, 21.—[5] Aitkens v. Orr, 11th February 1802.—[6] E. i. 6, 21. M'Kenzie v. Ewing, 19th November 1830.—[7] Graham v. Stewart, 4th March 1831.—[8] E. i. 6, 22. Fraser, i. 247, *et seq.*—[9] E. i. 6, 22. Ivory's Note.—[10] Greenlaw v. Galloway, M. 5957. Fraser i. 250.—[11] Fraser, i. 256.

business on her own account, she is liable for performance of her legal obligations.[1]

Excepting in the case of *præpositura* above mentioned, which will not without special authority extend to the borrowing of money,—so long as the parties are not separated, obligations of a personal nature granted by the wife, such as Bonds, Promissory notes, &c. are null, as affecting property which is not her own, but entirely under the control of the husband, whose right over the management of the moveable property is not a mere curatory, as in the case of the heritable property. Such acts, therefore, cannot be validated even with the husband's consent.[2] The nullity, however, appears to be of a kind that must be pleaded, and if the obligation be an onerous one, and have been fulfilled, or its enforcement has been submitted to, it does not appear that the consequent proceedings can be treated as utterly null.[3] The wife is personally liable for the consequence of crimes, when she is pursued criminally: but when she is pursued civilly, for damages, the liability is with the husband, in the same manner as any other civil debt.[4] In a case where an agent employed by a woman had succeeded in an action of declarator of marriage, in consequence of which a separate fund was created in favour of the wife, he was found, failing the husband's ability to pay his account, to have recourse for it against the fund so belonging to the wife, but without a right to execute personal diligence against her during her husband's life.[5] The wife may bequeath her share of the moveable estate, or make a disposition of her heritable estate, to come into operation after death, without the intervention of her husband.[6]

SECT. 7.—*Deeds and Donations by Married Persons.*

Contracts between husband and wife, if they are "onerous," are valid, and cannot be revoked. It is not necessary that there should be a consideration in value; a deed by which the husband makes a rational provision for his wife after marriage (not having done so before) will be considered onerous between the parties, whatever it may be in questions with creditors.[7] The law looks with jealousy on gratuitous obligations, or donations between man and wife. They are not null, but they are revocable. The revocation may be

[1] Churnside *v.* Currie, M. 6082. Orme *v.* Diffors, 30th November 1833. Paul *v.* Gibson, 14th June 1834, App. 7 W. S. 462. Fraser, i. 264. —[2] E. i. 6, 25.—[3] Thomson *v.* Stewart, 11th February 1840.—[4] Murray *v.* Graham, M. 6079. Fraser, i. 271.—[5] Gray *v.* Wylie, 26th June 1840.—[6] E. i. 6, 28.—[7] Short *v.* Murray, 27th June 1677, M. 6124.

express, by a deed explicitly revoking, or tacit, by a deed inconsistent with the terms of the donation.[1] A donation may be revoked after dissolution of the marriage while the donor is alive; and if he will not use the right, it may be acquired by his creditors.[2] In the interpretation of deeds between husband and wife, if a deed do not bear that it is for an onerous cause, it is presumed to be gratuitous. If it bear to be for an onerous cause, the presumption is reversed, but the deed may be proved to be gratuitous.[3] Where the interest of a third party is involved by the original deed, the donation is not revocable, unless that party's interest has been collusively introduced to cover a simple donation between husband and wife.[4]

Every deed granted under the effect of force or fear is null. In the case of a wife granting a deed, the proof of such influence on the part of the husband, especially if the deed favours himself, will be supported by presumptions. If the deed be in favour of a third party, reduction on this ground is barred by voluntary ratification of it by the wife in presence of a magistrate. In this ceremony, she declares on oath that the deed is her free act; and not only must the husband be absent, but the ratification must expressly bear that he was so.[5] Such ratification will not bar reduction of a deed in favour of the husband.[6] Where a wife refused, however, to ratify a deed in favour of her husband, it was found not reducible on the simple ground of non-ratification, and that force, fraud, or fear must be proved.[7] It is held that the ratification will not deprive the wife of any right of challenge on other ground than force and fear—such as fraud.[8]

SECT. 8.—*Separation.*

The obligation of the parties to live together may be enforced by an action of adherence, but notwithstanding this obligation, the law countenances a separation, and a separate provision. This may be either judicial or voluntary. In the former case, it proceeds on cause shown. The best ground for judicial separation is dread of personal violence; but the law looks beyond mere corporeal danger to such circumstances incompatible with the proper duties of the parties, as may be the occasion of permanent distress to any one of them. If the husband "should either abandon his family, or turn his

[1] E. i. 6, 31.—[2] Ibid.—[3] Fraser, i. 478.—[4] E. i. 6, 29.—[5] Ibid. 33-35. 6 & 7 Wm. IV. c. 43.—[6] E. i. 6, 35.—[7] Buchan *v.* Risk, 1st March 1834.—[8] Fraser, i. 436.

wife out of doors, or by barbarous treatment endanger her life, or even offer such indignities to her person as must render her condition quite uncomfortable, the judge will, on proper proof, authorize a separation *a mensâ et toro* (from board and bed), and award a separate alimony to her, suitable to her husband's fortune, to take place from the time of the separation, and to continue till there shall be either a reconciliation between the parties, or a sentence of divorce."[1] It was held good ground for awarding separation and aliment, that the husband insisted on retaining in his family a servant with whom the wife discovered he had carried on an illicit intercourse previously to the marriage.[2]

The amount of aliment must depend on the circumstances of each case. In a comparatively late instance it was held that a man enjoying an income of £200 a-year, but who was not shown to possess any capital, should give £50 a-year.[3] Aliment will be awarded to the wife without a judicial separation, when the husband has deserted her.[4] Voluntary separations, and alimentary provisions founded on them, are revocable by either party choosing to adhere, unless they have proceeded on such grounds as would justify judicial separation.[5] A voluntary separation will not found an action for aliment, if none be provided for by the terms of the contract; but if a wife have suffered bad usage, her interest is protected by her being able to raise an action of separation and aliment, notwithstanding the previous agreement.[6] The wife being either judicially, or by voluntary contract of separation, provided with a separate aliment, the husband ceases to be responsible for any of her obligations; they are effectual against herself, but as by a fiction of law her person cannot be attached by diligence while she is a wife, "the creditors who continue to deal with her, contract upon her faith solely."[7] The husband's *jus mariti* in regard to property belonging to the wife is not forfeited by the separation, but it appears that he ceases to exercise his right to administer the wife's estate.[8]

SECT. 9.—*Dissolution by Divorce.*

Actions of divorce, which were formerly brought before the commissaries of Edinburgh, now form part of the jurisdiction of the Court of Session, and questions of fact con-

[1] E. i. 6, 19; and see Fraser, i. 454.—[2] Letham *v.* Letham, 8th March 1823.—[3] Elder *v.* Elder, 5th February 1831.—[4] B. P. 1545.—[5] E. i. 6, 30. Shand *v.* Shand, 28th Feb. 1832.—[6] Lawson *v.* Macculloch, 28th November 1797, M. 6157.—[7] E. i. 6, 25.—[8] Fraser, i. 404, 431, 465.

nected with such cases may, at the discretion of the court, be tried by jury.[1] To prevent actions by which parties might, by mutual consent, dissolve marriages, the pursuer must swear that the action is not carried on by collusion.[2] The action of divorce is personal to the husband or wife injured, and cannot, even after it has commenced, be continued on the death of the pursuer, by heirs or others interested in its decision.[3] In the practice of our law the grounds of divorce are two: adultery and wilful desertion. The latter must have continued for four years.[4] The process in such a case commences with an action of adherence, which it is usual to raise after one year has elapsed, sentence in the divorce being suspended until the lapse of the four.[5]

Divorce on the ground of adultery may be met by a proof of remission of the injury, and such remission will be presumed where the injured party cohabits with the other after knowledge of the offence.[6] *Lenocinium*, or such conduct on the part of the husband as would naturally tend to corrupt his wife's morals, or expose her to seduction, will be a good defence to her.[7] Recrimination is no defence, but it may be a ground for a counter action, the result of which will be that the party first injured will have those pecuniary advantages, to be afterwards mentioned, which accrue to the successful pursuer of a divorce.[8] Before an action of divorce can proceed, both the parties must have acquired a domicile by forty days' residence in Scotland.[9] On the subject of divorce, an unfortunate discrepancy exists between the law of England and that of Scotland. The extinction of marriage by an action of divorce is unknown to the law of England, where a marriage can only be dissolved by an act of Parliament.[10] Owing to this discrepancy, a person who had been married in England having obtained a decree of divorce in Scotland, and being immediately after married in England, was there tried and punished for bigamy, on the principle that a marriage contracted in England is in its nature indissoluble in any part of the world.[11]

The effect of divorce is, that "the party offender tyne and lose their tocher and the *donationes propter nuptias*,"[12] by which it is understood that the wife, if she be the offender, forfeits to the husband the whole of her tocher or dower, and ceases to have any claim for the provisions which the husband may have come under obligation to award to her; and

[1] 11 Geo. IV. & 1 Wm. IV. c. 69, §§ 33, 37.—[2] E. i. 6, 45.—[3] B. P. 1536.—[4] 1573, c. 55.—[5] E. i. 6, 44.—[6] Duncan *v.* Maitland, 9th March 1809.—[7] M'Kenzie *v.* his Wife, 28th Feb. 1745, M. 333.—[8] B. P. 1535.—[9] Ringer *v.* Ringer, 15th January 1840.—[10] Ferguson, 84.—[11] Case of Lolly, Russell 189.—[12] 1573, c. 55.

that the husband if he be the offender, must restore the sum he may have received in name of tocher, and must at the same time make good all provisions in the wife's favour, whether they be legal or conventional.[1] The statute on which this law is founded applies solely to divorce on account of desertion, and its extension to the case of adultery was much doubted.[2]

It is a doctrine of the law, fortunately almost unknown to practice, that a marriage may be dissolved at the instance of one party on the ground of the physical disability of the other at the time of the union. It is disputed whether this dissolution is by divorce or declaration of nullity, but it seems to be of the former character, as the question whether there shall be dissolution or not is held to depend on the conduct of the parties, who may contract an indissoluble marriage if they are aware of the physical peculiarity at the time.[3]

SECT. 10.—*Dissolution by Death.*

Marriage is considered by the law as permanent, if it has either subsisted for a full year and part of the next day, or a living child has been born of it, the crying of the child being in cases of doubt admitted as the only proof that it was born alive.[4] When a marriage is dissolved by the death of either party, before it has been so made permanent, all matters of pecuniary interest revert, as nearly as they practically can, to their former situation. All grants made in consideration of the marriage are restored. The tocher, if it came from the wife's property, reverts to her if she be the survivor; or to her executors, if she has deceased. If it has been given by another person, it reverts to the giver.[5] The husband is said to be accountable for the whole tocher, deducting the wife's funeral expenses, or the debts contracted by her previous to the marriage; but it seems to be understood that the expenses of the wife's maintenance may be deducted from her moveable property falling incidentally under the management of the husband while the marriage subsisted.[6] All rights of succession, or others arising from survivorship, cease, whether legal, or conventional through marriage-contracts.[7] These reversions, which must always create confusion, may be barred by the terms of marriage-contracts.[8] (*See above*, p. 20.) A widow losing her provision by this rule,

[1] E. i. 6, 46.—[2] Ibid. 48, Iv. n.—[3] Fraser, i. 50-62. See Pollard *v.* Weyburn, 1 Hag. Eccl. 725.—[4] E. i. 6, 40, 42, Dobie *v.* Richardson, 17th July 1765, M. 6183.—[5] E. i. 6, 38.—[6] E. i. 6, 39, & Iv. n.—[7] E. i. 6, 38.—[8] Ibid. 42.

has a claim against her husband's representatives for aliment and mourning expenses, and it is said that the same principle would extend to an indigent widower.[1] The consequences of the dissolution of a permanent marriage by death, in as far as it affects the division of or succession to property, will be found discussed under the subject of succession (*see Part* III.); but two liferent rights, the one accruing to the wife, the other to the husband surviving, are considered in the ensuing section. On the death of a husband, when there is a permanent marriage, the widow is entitled to aliment till the first term of Whitsunday or Martinmas, when her legal or conventional provisions become payable, and to mourning expenses.[2]

SECT. 11.—*Terce and Courtesy.*

Terce is the right of the widow, in a permanent marriage, to a liferent of one third part of the heritable property in which her deceased husband was infeft when he died. Where a special provision has been granted by the husband, either before or after the marriage, it is understood to supersede the terce, unless the right to terce is reserved specially or by implication.[3] "The husband's Seisin is both the measure and the security of the widow's Terce, wherefore every right which excludes the husband's seisin is also preferable to the terce, and, in so far as it extends, must diminish it."[4] On this principle, debts made real on the estate exclude the terce, and so will the exercise of a faculty to burden, if infeftment has followed. The husband's right must be a substantial and not a nominal or trust right; and, on the other hand, the terce will be sustained to the extent of the husband's real interest, where he stands only nominally divested;[5] as where a debt is secured on his property in the form of an absolute disposition. (See Index, *Bond and Disposition.*)[6] Tenements held burgage (*see below*, p. 58,) are excluded from the terce; so are feu-duties, patronages, leases, and coal-mines.[7] Where the husband, shortly before his death, feued out the greater part of his property in a single transaction, the widow's right of terce was found to extend only to the rent of the remainder.[8] Where lands are previously charged with a terce, the widow of a second deceasing proprietor enjoys a third of the remaining two-thirds, termed a "lesser terce," until the death of the previous tercer, when she acquires right to a full terce.[9]

---

[1] Lowther *v.* M'Laine, M. 435. Fraser, i. 519.—[2] Fraser, i. 522, 524.—[3] 1681, c. 10. E. ii. 9, 45.—[4] E. ii. 9, 46.—[5] Iv. Ex. 457, n.—[6] B. C. i. 59.—[7] E. ii. 9, 49.—[8] Nisbet *v.* Nisbet, 24th Feb. 1835.—[9] E. ii. 9, 47.

Brieve.—The means by which the widow's right to terce is established is a Brieve, directed from the Chancery to the Sheriff of the county where the lands lie, who empannels a jury to inquire, on two heads, first, whether the widow was lawful wife of the deceased, and, second, whether her husband died infeft in the lands specified in the brieve. The right to terce having been established, a portion of the land is allocated to the widow by a process called a Kenning to the Terce, in which the sheriff allots to her an alternate acre of each three, having cast lots to discover whether he shall begin at the east or the west end of the estate; but such an inexpedient division is generally avoided by a mutual arrangement.[1]

Courtesy is a liferent right in the surviving husband of all the heritage in which his wife died infeft. It only exists in the case of a living child having been born of the marriage, and there being no heir to the wife by a former marriage.[2] The lands over which it extends are, such as the wife has succeeded to as heir of line or provision, &c., not such as she may have acquired by donation or purchase.[3] The husband takes the liferent, with all heritable burdens, and his wife's personal debts are effectual against him, he having recourse on her executors.[4] No service or other ceremony is necessary to enable the husband, having a right to courtesy, to continue to draw the rents of the estate, of which he was the legal administrator during the life of his wife.[5]

CHAPTER II.

Parent and Child.

Sect. 1.—*Legitimacy.*

The child of a woman, whose husband is alive, or has died within such a period as admits of the presumption of his being the parent, is presumed to be legitimate. The presumption cannot be met by any other counter-proof than such as shows it to be physically impossible that the husband could be the father.[6] In the case of bigamy, or of marriage within the forbidden degrees (*see Chap.* I. *Sect.* 2), it is held by the commentators that ignorance of the circum-

[1] E. ii. 50. Jur. St. i. 443, *et seq.*—[2] E. ii. 9, 52, 53.—[3] Ibid. 54.—[4] Ibid. 55.—[5] Ibid. 52.—[6] St. iii. 3, 42. E. i. 6, 49, 50.

stance on the part of either of the parties will legitimate the offspring.[1] The subsequent marriage of the parents of an illegitimate child, legitimates the child, unless they were in such a position at the birth that they could not lawfully marry, as by one of them being married to another. A child so born will take precedence in succession of the children born during the marriage.[2] After the question had been the object of much speculation among lawyers, it has now been decided, that the marriage of the parents of a natural child will legitimate the child, though one of the parents should after the birth of the child have been married to another person, and had children in wedlock. These children of the intermediate marriage are not of course deprived of their legitimacy, but it has become a curious question how the relative rights of succession can be adjusted in such a case. It appears that the legitimacy only dates back to the time of the marriage of the parents, and therefore that it does not interfere with rights that have opened to the children of the intervening marriage, but there has been no decision on this point.[3]

Where a person, who inherited landed property in Scotland, but who lived in England, and had an illegitimate child there, married the mother of the child during a brief residence in Scotland, the Court of Session held the child legitimate;[4] but the House of Lords reversed the decision, on the principle that the child of unmarried persons born in England entered life with a legal disqualification, which no subsequent act of the parents could remove.[5] It has been held in England, that a child legitimated in this country by the subsequent marriage of the parents cannot succeed to landed property there.[6]

SECT. 2.—*Mutual Obligation to Support.*

Parents' Obligation.—The father, as the head of the family, is the first person to whom the law looks as the supporter of his children where they cannot support themselves. "He is obliged to preserve and protect them during their nonage; to provide them in bed, board, and clothing, and all the necessaries of life; and to give them an education suitable to their rank, in their younger years."[7] It would appear that subsistence is all the pecuniary assistance that a son

[1] E. i. 6, 51.—[2] Ibid. 52.—[3] Kerr *v.* Martin, 6th March 1840.—[4] Rose *v.* Ross, 15th May 1827.—[5] Ibid. 16th July 1830, 4 W. & S. 289.—[6] Birtwhistle *v.* Vardill, 1826, 5 Barn. & Cres. 438. House of Lords, 1 Rob. 627.—[7] E. i. 6, 56.

can demand, and so, where a father possessed entailed estates to the extent of £10,000 per annum, and his son and heir held a commission in the army which yielded him £90 a-year, while he was allowed £100 a-year by his father, the House of Lords reversed a decision binding the father to provide farther aliment.[1] The father is not bound to aliment the child out of his house, unless his harsh temper render it impossible for them to reside together.[2] The obligation ceases when the child can gain his own subsistence, a period which will depend on the rank of the parent and the sex of the child.[3] The obligation descends to the heir of the father, or any person succeeding to his property.[4]

By the Poor-law Act, a parent able to maintain his children, and failing to do so, may be criminally prosecuted as a vagabond, and is liable to fine or imprisonment.[5]

The duty of aliment devolves, in the second place, upon the mother, if the father or his representative be indigent, and the mother comparatively affluent.[6] The duty falls, in the next place, on the grandfather, and so upwards.[7] The father has been held bound to maintain his son's wife, when destitute,[8] but not his widow;[9] though it was found that the proprietor of an entailed estate was liable to support his son's widow, who was mother to the heir of entail.[10]

Children's Obligation.—The duty of aliment is reciprocal, children who are able to do so being bound to support their indigent parents.[11] A son was bound to contribute to the maintenance of his father, who, though not destitute, was in indigent circumstances, and incapable of working.[12] A son was held not to fulfil the obligation to aliment his mother by receiving her into his house, unless he was unable to afford her a separate maintenance.[13]

SECT. 3.—*Parents' Authority.*

The parents are the guardians of their children while they are minor, and reside in family with them, the father, while he lives, taking the direction, which the mother assumes on surviving him. There are few late decisions on the powers of parents over children, and the law as stated by Erskine is

[1] Maule *v.* Maule, 1st June 1825, 1 W. & S. 266.—[2] E. i. 6, 56, Cairns *v.* Bellamore, July 1687, M. 410. Fraser, ii. 36.—[3] E. i. 6, 56.—[4] Iv. Er. 161.—[5] 8 & 9 Vict. c. 83, § 80.—[6] Iv. Er. 159, M. St. xxix.—[7] Tait *v.* White, 28th Feb. 1802, M. Aliment, Ap., No. 3.—[8] Duncan *v.* Hill, 17th Feb. 1810.—[9] Youill *v.* Marshall, 21st Dec. 1815.—[10] De Courcy *v.* Agnew, 3d July 1806, M. St. xxix.—[11] E. i. 6, 57.—[12] Pringle *v.* Pringle, 10th July 1824.—[13] Jackson *v.* Jackson, 17th Nov. 1825.

almost the sole guide on the subject. "This parental power or authority," he says, "is chiefly discovered in the father, whom nature has constituted the head of the family, and who, in that character, has the sole and absolute right of directing whatever concerns the persons of his children under age, of exercising that degree of discipline and moderate chastisement upon them which their perverseness of temper and inattention calls for, and of ordering every thing relating to their education, or the improvement of their minds. He is entitled to all the profits accruing from their labour and industry, while they continue in his family, or are maintained by him at bed and board. But even then the children are capable of receiving donations either from the father himself, or from others, which thereby become their own property. Children who get a separate stock from the father during their minority for carrying on any trade or manufacture, or setting up a separate employment by themselves, even though they should continue in his family, may be said to be emancipated or forisfamiliated, in so far as relates to that stock, for the whole profits arising from it are their own. But if the profits arising from such employment shall be sufficient for their subsistence, the father is not obliged to maintain them in his family at his own expense, but may article with them for the payment of board. Forisfamiliation, when understood in this sense, is also inferred by the child's marriage, or by his living in a separate house, with his father's consent or permission."[1]

A father can undoubtedly compel his child when in pupillarity to live with him. Beyond that age it would appear that he is not entitled to prevent his child from living apart, and supporting himself. He cannot, however, be compelled to aliment a minor son or daughter otherwise than under his own roof.[2]

The father is tutor to his children (*see below, Chap.* III.), and curator, even in the management of property left by a stranger, unless he be specially excluded. He ceases to be curator to a daughter on her marriage.[3] Fathers in administering their children's property, are not in the general case obliged to take the oath of faithful administration, or to give security, or make inventory, as in the case of strangers.[4] (*See below, Chap.* III.) The father being the legal guardian, the child cannot, in the general case, choose another during his lifetime. Where the child, however, has separate pro-

[1] E. i. 6, 53.—[2] M. St. xxxi.—[3] E. i. 6, 54.—[4] Ibid. 55.

perty, precautions rendered necessary by the situation or character of the father will be sanctioned by the court.[1] Thus the appointment of a factor and tutor was sanctioned by the court where the father was an undischarged bankrupt, with no settled domicile.[2] As to the liability of minors for their engagements, *see below*, p. 42, *and Part* IV. *Chap.* I.

On the father's death, the mother, while she remains unmarried, has the custody of children in pupillarity, and the general guardianship of the children, so far as she is not superseded by tutors and curators.[3] The vicious conduct of the mother will form a good ground for removing the child from her charge.[4]

SECT. 4.—*Illegitimate Children.*

The law as to the custody of illegitimate children is not very clearly defined. It is a doctrine of civilians, that such a child has, in the eye of the law, no father. The same principle has ruled in Scotland, somewhat modified in practice, for it is held that "there is no fixed rule as to the custody of illegitimate children; and the only general one which can be laid down is, that the court must attend chiefly to what is most beneficial for the child."[5] Professor Bell says, that "the mother has the custody till seven in males, ten in females,"[6] yet, in a case where the mother was allowed to reclaim a boy of twelve years of age from the relations of the father, it was said on the bench, "I regard this case as if the father of the bastard were still alive. I look to the father's legal rights, and I do not see that he is entitled to the custody of his natural child. The right is in the mother."[7]

The improper conduct of the mother will form a good ground for the removal of the child, and so apparently will her marriage, at least if an appropriate asylum is elsewhere offered to the child.[8] The mother's position in society, however, arising from the illicit intercourse of which the child is the fruit, cannot, in any state of circumstances, be a ground for depriving her of its charge. This was decided in the very strong case of the father having left his natural daughter a large fortune, to be administered by tutors and curators.[9]

---

[1] M. St. xxxi.—[2] Johnstone *v.* Wilson, 11th July 1822.—[3] E. i. 7, 8.—[4] Paul, petitioner, 8th March 1838.—[5] Opinion of Lord Craigie in Baxter *v.* Forsyth, 5th July 1825.—[6] B. P. 2062.—[7] Lord Balgray in Goodby *v.* Maccandys, 7th July 1815.—[8] Fairweather *v.* Lyall, 23d May 1826. M'Glashan on Actions of Aliment, 92.—[9] Baxter *v.* Forsyth, 5th July 1825.

Aliment.—The father's liability for aliment appears to have generally affected the question of custody. In extreme youth, the father is compelled to aliment the child, while the mother is entitled to its custody; but a disposition has been shown in cases where aliment is compulsorily exacted from the father, to let him have the alternative of taking the child from the mother's custody at an earlier age than that at which the proceeding is in other circumstances sanctioned. Thus, a tradesman was found entitled to take his son home and teach him his trade at the age of eight, instead of supplying aliment.[1] It is said that whichever parent can afford to do so, must aliment the child, and that if both are able to do so, they are equally liable.[2] It does not appear, however, that the woman can ever be called on to supply part of the wages of her labour where the father is alive and well, though but in the condition of a labouring man, and the father is almost invariably the party bound. It is held that on the father's death, his heir is liable. The amount of aliment is entirely arbitrary, and dependent on the rank and circumstances of the parties, the lowest being £5 a-year.[3] The child must be alimented even after it has grown up, if infirmity prevent it from supporting itself.[4] Where the father bound himself to aliment till the age of twelve, the mother relieving him of all claim thereafter, the stipulation was held not to bar the child from claiming against the father after he had reached that age.[5] The provisions of the Poor-law Act above stated (p. 34), apply to natural as well as to legitimate children.

When the paternity is denied, the mother is entitled to give her oath in supplement, on circumstances being proved, which do not merely found a suspicion but give ground for a reasonable belief (though it be not fully proved) that the defender is the father.[6]

---

[1] Kay *v.* M'Laurin, 14th June 1826.—[2] M'Glashan, 64.—[3] Ibid. 68.—[4] Pott *v.* Pott, 7th December 1833.—[5] Ibid.—[6] Kirkpatrick *v.* Donaldson, 2d June 1843. M'Glashan, 80, *et seq.* Mitchell *v.* Paton, 17th January 1833. Martin *v.* Smith, 17th May 1834. Glendinning *v.* A. B., 17th January 1835. Byres *v.* Shankland, 18th June 1835. Lennox *v.* Agnew, 13th Dec. 1839. Simpson *v.* Ross, 3d June 1841; Bruce *v.* Petrie, 20th Nov. 1841. Kerr *v.* Hamilton, 8th Feb. 1842. M'Laren *v.* M'Culloch, 12th June 1844. Fraser, ii. 54.

CHAPTER III.

GUARDIAN AND WARD.

SECT. 1.—*Tutors.*

THE guardians of minors during the period of pupillarity (which lasts till the age of twelve in females, and of fourteen in males), are termed Tutors.[1] During that period the minor is held incapable of and not responsible for the undertaking of any obligation, the sole disposal of his property being vested in his tutors.[2]

Tutor Testamentary.—The power of naming Tutors with the full privileges of the office in testamentary deeds is solely in the father,—the mother, grandfather, and other relatives being only entitled to nominate individuals for the management of any special estate left by them to the pupil.[3] A Tutor named by the father is termed a Tutor Nominate or Testamentary.[4]

Tutor at Law.—In the absence of a Tutor Testamentary from omission to appoint, non-acceptance, resignation, or death, the custody of the minor falls to a Tutor at law, or Tutor Legitim, who is the nearest Agnate or male relation on the father's side of the age of twenty-five. When there are more than one of the same degree, the person who is nearest the succession is preferred.[5] The agnate must enter by a brieve from chancery, on which a jury have to make inquest as to his relationship and qualifications.[6] The tutor at law is entitled to the disposal of the pupil's person, and may fix his place of residence, direct his education, &c.[7] The mother, however, is entitled in all cases of tutory where she is not expressly excepted, to the actual custody of her child, at least to the age of seven, unless she marry again; and in the case of a tutor at law, the nearest Cognate or relation by the mother's side is preferred for the custody of the child.[8]

Tutors Dative.—Failing Tutors Nominate and Tutors at Law, Tutors Dative are appointed in exchequer, the next of kin having been cited, or the two nearest giving their consent.[9]

---

[1] E. i. 7, 1.—[2] Ibid. 14.—[3] St. i. 6, 6. E. i. 7, 2. Fraser, i. 76.—[4] E. i. 7, 2.—[5] 1474, c. 51. St. i. 6, 8. E. i. 7, 4, 6. Fraser ii. 85.—[6] E. i. 7, 6. Jur. St. i. 4, 21.—[7] Fullerton *v.* Wilson, 31st January 1829.—[8] E. i. 7, 7. See Reoch *v.* Rob, 14th November 1817.—[9] 1672, c. 2. St. i. 6, 11. E. i. 7, 8, 9.

A Tutor Testamentary may enter at once on his duties without finding caution, or giving oath of faithful administration, which are incumbent on the other two classes.[1] All classes of tutors must make up Inventories, under the responsibility of being each individually liable for all omissions or defects of management, either by himself or his colleagues, and of not being remunerated for lawsuits carried on for the pupil.[2] The next of kin on both sides are called to the making up of the inventory, unless they be beyond the jurisdiction of the court, when dispensation may be given.[3] Three copies of the inventory are lodged, one for each of the next of kin on either side, and one to be recorded.[4] Where the tutor is himself the nearest of kin on either side, the next to him must be cited.[5] Married women cannot be tutors, as they are themselves under the guardianship of their husbands; and when an unmarried woman is appointed to the office, she vacates it on being married.[6] Where the affairs of a pupil who has no tutors are in a state which calls for immediate superintendence, the court will appoint a Factor or interim Tutor.[7]

SECT. 2.—*Curators.*

A minor who has passed the period of pupillarity, is no longer subject by the law to personal restraint, and is presumed capable of undertaking a legal obligation. At the same time, such persons are presumed to be liable to mismanage their affairs, and to be the ready subjects of fraud; and the administration of their property is generally committed to curators. If a father nominates a Curator to his minor child, such nomination supersedes any other general choice, though a third party leaving property to the minor is entitled to put it under what trusteeship he may think fit.[8] If the father has not appointed curators, the minor may, by a judicial process, in which two of the nearest of kin on either side are cited, have Curators appointed to himself.[9] The minor has no second choice, and a curator once judicially appointed is entitled to hold his office till his ward's majority, unless he be superseded by the court.[10] The minor cannot restrict the responsibility of the curators so appointed, but the father may do so with regard to those named by

[1] E. i. 7, 3.—[2] Ibid. 7, 21, 22. Fraser, ii. 92.—[3] E. i. 21. Shields, petitioner, 2d February 1832.—[4] E. i. 7, 21. B. P. 2081.—[5] E. i. 7, 21.—[6] Ibid. 12.—[7] Ibid. 10.—[8] Ibid. 11, 13.—[9] Ibid. 11, 1555, c. 35. Fraser, ii. 188.—[10] Fraser, ii. 191.

himself.[1] In the case of a natural child, where there were no legal next of kin to be cited, the court on one occasion appointed curators, dispensing with the citation,[2] and a natural child to whom his father leaving him property had appointed guardians, was found entitled to apply for the appointment of curators.[3]

Curators must find caution and prepare inventories in the same manner as tutors.[4] (*See preceding Section.*) A curator cannot, as a tutor may, direct the disposal of the minor's person. He does not supersede the minor in the management of his affairs, but merely assists him. An obligation incurred by the curator alone in the minor's name is therefore null, and every valid obligation of a minor who has curators must be undertaken by the minor, and consented to by the curators.[5]

SECT. 3.—*Powers and Responsibility of Guardians.*

Tutors and curators have no claim to be remunerated for the performance of their duties.[6] Where there are several guardians, the number necessary to form a quorum is generally fixed by the terms of the appointment, and one is occasionally named as indispensable, or "*sine quo non*,"—without whose presence no act is valid.[7] The quorum can never be less than a majority. "Tutors and curators have power to sue for and levy the minor's rents, interest, and principal sums, if his necessities call for it; to grant acquittances to the debtors, and to name factors or stewards with reasonable salaries."[8] These acts must, in the case of curators, of course, be with the concurrence of the minor. They may remove tenants and grant leases. Those granted by tutors cannot, in the ordinary case, extend beyond their period of office;[9] the court will, however, give authority where it is necessary, to lengthen the period of the lease, though not where it is merely expedient to do so.[10] It is held, however, that a minor above pupillarity may, with the consent of his curators, grant a lease beyond the period of minority.[11]

Guardians "have power to sell the minor's moveables, without which his personal estate would frequently be lost

[1] Ray *v.* Watson, 16th July 1773, M. 16369.—[2] Young, 19th February 1818.—[3] Wilson *v.* Campbell, 10th March 1819.—[4] E. i. 7, 21—[5] Ibid. 14. St. i. 6, 35. Fraser, ii. 195.—[6] E. i. 15.—[7] Ibid.—[8] E. Pr. i. 7, 9.—[9] E. i. 7, 16. Rea *v.* Anderson, 5th Feb. 1800, M. 16385.—[10] Hallows, 1st March 1794, M. 14981. Ross. *v.* Ross, 9th March 1620.—[11] Iv. Er. 172, n. 207.

to him."[1] A minor, with consent of his curators, may dispose of his landed property, though the person who acquires it is liable to restoration if the bargain prove prejudicial.[2] (*See below, Sect* 4.) It was formerly understood that the court would interfere to sanction such transactions,[3] but in a case in 1817 they refused to interpose, leaving the matter to the discretion of the curators.[4] Tutors cannot sell the heritable property of their pupil without consent of the court, which is only adhibited on a case of necessity being made out.[5] Tutors cannot by any act alter the succession to the pupil's property, and so, if they take heritable securities for the money intrusted to them, the property remains personal as to succession.[6] "Neither tutors nor curators can, contrary to the nature of their trust, authorize the minor to do any deed for their own benefit; nor can they acquire any debt affecting the minor's estate. And where a tutor or curator makes such acquisition in his own name for a less sum than the right is entitled to draw, the benefit thereof accrues to the minor, though the right should have been bought with the tutor's own money."[7] Tutors and curators must educate the minor according to his property and position in society, preserve his estate from dilapidation, pay debts, and put the free returns out to interest.[8] It has been found that a tutor is bound to accumulate rents every three years into a capital bearing interest.[9]

Tutors or curators having once accepted a trust cannot resign it.[10] Curatory ceases with the marriage of a female ward.[11] Both tutory and curatory fall by any supervening incapacity, whether natural or legal, which may disqualify the tutor or curator from discharging the office.[12] The Court of Session will, on complaint supported by cause shown, remove tutors and curators as "suspect."[13] Guardians, at the termination of their office, can be compelled by action to account for all receipts and expenditures, and to restore all documents and property;[14] and they have, on the other hand, a counter action on the expiry of their office, for reimbursement of their expenses, and discharge from their responsibility.[15] Persons who without any formal authority perform the duties of tutors and curators to minors,—called Pro-tutors and Pro-curators,—are liable in the same responsibility as tutors and curators.[16]

[1] E. Pr. i. 7, 10.—[2] E. i. 7, 17.—[3] Ibid.—[4] Wallace *v.* Wallace, 8th March 1817. See Montgomery, 29th Jan. 1839.—[5] E. i. 7, 17. Finlaysons *v.* Finlaysons, 22d December 1810, B. C. i. 132.—[6] Iv. Er. 175, n. 213. Graham *v.* Hopeton, 6th March 1798, M. 5599.—[7] E. Pr. i. 7, 11.—[8] E. i. 7, 25.—[9] Hamilton v. Marshall, 25th February 1813.—[10] E. i. 7, 29.—[11] Ibid.—[12] Ibid.—[13] Ibid.—[14] Ibid. 31.—[15] Ibid. 7, 32.—[16] Ibid. 28.

SECT. 4.—*Privileges of Minors.*

The deeds of a pupil are null, and those of a minor without consent of his curators, if he have any, are reducible, in as far as a reduction may be for his interest; but if they are deemed advantageous to him, they may be taken advantage of, and will be held binding on the other party.[1] The estates of minors are, however, in all circumstances liable for sums profitably applied for their use.[2] Minors above pupillarity, having no curators, may contract as freely as any other person; and though they have curators, they can bequeath their moveables without their consent. A minor however cannot, even with his curator's consent, make a settlement of heritage.[3]

Minors, whether they have or have not curators, are (with the exceptions stated below) entitled to be restored against deeds which they can prove to be prejudicial to their interest, even though they have been granted with the interposition of the court.[4] To justify restitution, the contract must be shown to be in its nature prejudicial. It will not be sufficient that the minor have suffered from an after-depreciation, as from a house which he has bought being burned.[5] Some deeds, such as obligations for money borrowed, will, from their nature, be presumed to be prejudicial, unless the contrary be proved, and the want of curators will strengthen the presumption.[6] It is believed that a debtor cannot pay up a principal sum to a minor with safety, unless he knows that it is to be employed to his advantage, or a curator have interposed.[7] Restitution must be reciprocal, the minor restoring so much as will make him, not a gainer by the resumption of the transaction, but in the situation in which he was before he entered on it.[8]

If the minor has married between his pupillarity and majority, his privilege does not extend to a challenge of the marriage, but it may entitle him to reduce the marriage-contract.[9] A minor, who has commenced business on his own account, cannot be restored against the deeds granted by him in the course of his business, *e. g.* bills of exchange, bonds for borrowed money, &c.[10] In a case where a boy of seventeen was found liable for money misapplied, in the

---

[1] E. 33. B. C. i. 132.—[2] E. i. 7, 33.—[3] Ibid. Cunynghame *v.* Whitefoord, 8th March 1797, M. 8966. [4] E. i. 7, 34. Wallace *v.* Wallace, 8th March 1817.—[5] E. i. 7, 36. B. C. i. 136.—[6] E. i. 7, 37. B. C. i. 136. M'Michael *v.* Barbour, 17th Dec. 1840.—[7] Iv. Er. 188, n. 228.—[8] E. i. 7, 41. B. C. i. 136.—[9] E. i. 7, 38.—[10] Ibid.

course of the duties of sheriff-clerk-depute which he had undertaken, it was laid down "that a minor, whenever he undertakes an employment, by which he gains a part of his livelihood, becomes responsible, as well to his employer as to the public, for all his acts done in that situation."[1] Restitution was refused for debts incurred by the son of a nobleman in the army, for articles which, "although not absolutely necessary, were commonly possessed by young gentlemen of fashion and fortune."[2]

The right to restitution is competent to the heirs or creditors of the minor; but whoever is to use it, the action must be commenced within four years after the minor has attained majority.[3] Questions of accounting between minors and their tutors and curators prescribe in ten years, and after the lapse of that period from his reaching majority, guardians cannot be made responsible for their management of the property of their ward.[4] In the case of deeds which the minor, on attaining majority, can reduce as above, he must bring his action of damages against the curator within the four years.[5] A minor is privileged, from being called on to defend the feudal title of his paternal ancestor, if it is disputed by one claiming a preferable title.[6] Minors cannot vote for persons to fill, or, in their own persons, fill public offices; *e. g.* seats in parliament, or in town-councils and other corporations.

SECT. 5.—*Guardians to Idiots and Madmen.*

Cognoscing.—Idiots and madmen may be subject to guardianship after being "cognosced" by a jury. The process commences with the next of kin obtaining a Brieve of Inquest from Chancery, directed to the Sheriff, and empowering a jury to inquire as to the nature of the malady of the individual, and the period during which he has been subject to it.[7] The individual should be produced to the jury, and personally examined by them,[8] and the want of such personal examination will be a material ground of reduction.[9]

The effect of a verdict, finding the individual either insane or an idiot, is, that all obligations granted by him from the period when the malady is decided to have commenced are invalid, as presumed to have been granted by one incapable of consent, unless it can be proved by the holder of the obligation that the granter was of sound mind at the time.[10]

[1] Heddell *v.* Duncan, 5th June 1810.—[2] Johnston *v.* Maitland, 20th Nov. 1782, M. 9036.—[3] E. i. 7. 35. B. C. i. 135.—[4] E. iii. 7, 25.—[5] Ibid. i. 7, 35.—[6] Ibid. 43, 44.—[7] E. i. 7. 50.—[8] Ibid. 51.—[9] Dewar *v.* Dewar, 25th February 1809.—[10] E. i. 7, 50, and Iv. n.

The office of guardianship devolves on the nearest male agnate, if he is capable of exercising it; if not, a tutor dative is applied for.[1] A father is guardian to his insane or imbecile child, and a husband to his wife in similar circumstances.[2] A father can appoint a curator-testamentary to his insane or imbecile child; but it is understood that, to give him full power to act beyond the period of majority, the ward should be cognosced.[3] The guardian must resign his office, and account to his ward on the restoration of the latter to a sound mind; but he cannot, with safety, do so without judicial sanction.[4]

In cases where individuals, without being quite insane, or idiots, have been subject to hallucinations, or have been, from great mental or bodily weakness, unable to conduct their affairs, the Court of Session has, in its own discretion, appointed guardians.[5]

Interdiction is a process by which persons of facile temper may be subjected to curatory in regard to their heritable property. It may be a judicial act proceeding on the application of the heir or next of kin, or a voluntary obligation by the party. It must be recorded in the register of inhibitions. It only renders deeds reducible in so far as they are prejudicial. (*See Sect.* 4.)[6]

---

[1] E. i. 7, 50. B. P. 2109.—[2] E. i. 7, 50.—[3] Ibid. 49.—[4] Ibid. 52.—[5] Ibid. 48, and n.*—[6] Ibid. 53-59.

PART II.

THE VARIOUS CLASSES OF PROPERTY AND THEIR RESPECTIVE TENURES.

CHAPTER I.

Distinction between Heritable and Moveable.

This leading distinction apparently corresponds, at least in its general features, with the English division into Real and Personal; and as these latter terms are sometimes employed in acts of parliament which relate to Scotland, it has been necessary to consider them equivalent to the words Heritable and Moveable. This distinction pervades many portions of our law; it characterizes the whole law of succession; it is intimately connected with the law of landlord and tenant; it affects the law of contracts in general, in as far as it often depends on the question—whether a thing be heritable or moveable, whether it has changed owners or not; and it has divided the department of the law relative to Diligence or Execution for debt, one branch being applicable to the attachment of Heritage, the other to that of Moveables. It is however in reference to succession, and in distinguishing the property which goes to the Heir from that which falls to the Executor, that lawyers are accustomed to lay down the broad rules of distinction between Heritage and Moveables.

Sect. 1.—*Corporeal Property.*

Land, with all the portions of the crust of the earth incorporated with it, as minerals, turf for fuel not separated, &c. is heritable. Trees and wild plants not recovered from the ground are heritable.[1] Certain things artificially attached to the land are also heritable; among these are buildings,

[1] E. ii. 2, 4.

and fixtures, such as the doors and windows of buildings, and machines of extensive size.

Machinery.—Some of the most difficult questions regarding the distinction of heritable and moveable are connected with machinery. Sometimes the subject is heritable and the machinery is a mere accessary; but on other occasions the material subject is the trade with the capital invested, and the machinery, whether fixed or loose, is a mere adjunct of it. In a late case, where the matter was well considered, it was admitted that in the former alternative the machinery would be heritable, and in the latter moveable,—and that it was difficult to draw the line. A decision, however, was given in a question of succession, as to machinery erected by a landlord, in connexion with mines in his own personal occupancy, and for the purpose of raising the minerals and converting them into a marketable commodity. It was found that all the machinery directly attached to the ground, or indirectly, by being connected with what was so attached, though capable of removal, was heritable. The rule included "those loose articles which, though not physically attached to the fixed engines, are yet necessary for their working, provided they be so constructed and fitted as to form parts of this fixed machinery, and not be equally capable, in their existing state, of being applied to any other engines of the kind."[1] In the case of machinery and other property in a like position, the rule as to what is heritable in questions of succession is far from corresponding with that applicable to questions among creditors. In the former, in conformity with the above decision, the buckets, chains, and other accessaries of a coal mine are heritable, and even the horse used for driving a horse-mill has been maintained to be so, while in questions of the latter kind some hold that whatever can be removed with safety to itself and the property is moveable.[2]

Leases of lands and tenements, although they are properly speaking personal rights arising out of contract, are heritable, in so far as regards succession and the means of attachment for debt.[3]

Heirship Moveables.—In questions of succession, certain subjects of a moveable character, termed Heirship moveables, are considered as heritage. It is difficult to define these, otherwise than as such a portion of the furniture of a mansion, or the stocking of a farm, as will enable the successor

[1] Dixon *v.* Fisher, 6th March 1843; affirmed, 26th June 1845. 4 Bell, Ap. 286.—[2] E. ii. 2, 4, and Iv. n. M. St. cxxxviii. *et seq.*—[3] M. St. cxli. Hunter, ii. 540.

to keep up the establishment. The words of the statute "the best of ilka thing," have been understood by Stair and Erskine not to mean literally the choice from among all the moveables of the ancestor, such as wine, uncut cloth, &c., but merely the principal objects of furniture, and the like.[1] "In moveable subjects, which go by pairs or dozens, as in table-plate, bed and table linen, &c. the best pair or dozen is the heirship; and for the same reason, where the deceased had any number of cattle proper for tillage, the heirship is the best yoke; that is, as many as make a plough."[2] The family seal, and other things known by the the term "Heirlooms," are generally heirship.

SECT. 2.—*Incorporeal Property.*

Incorporeal Rights affecting Land are heritable, such as Securities, Teinds, Patronage, Annualrents, &c. Arrears of interest on heritable securities are not heritable, being looked on as independent debts.[3] The succession to a creditor may be changed, by his altering the security of his debt, from a personal security to a security on land, or by his taking a security on land as an accessary to, or in addition to, personal security.[4] The tendency of later decisions has been to narrow this fictitious conversion of moveable property into heritable. During last century it was held that whatever may accrue to the creditor through a trust-deed to heritable property, will be in the same situation, unless the trust-deed have been granted "for the sole and immediate purpose of paying the debts by a sale."[5] More lately, however, it seems to have been held that debts, moveable on the face of the voucher constituting them, cannot be made heritable by a trust-deed conveying heritable property to trustees for security of the creditors, when these have no security in their own persons over the property, but have only a claim against the trustees.[6] Expressed intention on the part of the holder may alter the character of heritable and moveable property. It is held that instruction to sell an heritable security, and convert it into money, makes it moveable, and in the same manner, that an instruction or obligation to spend a sum of money on land makes it heritable, though the project should not have been put in practice.[7] It does not appear, however, that the merely conferring powers on trustees or others to alter

[1] 1474, c. 53. St. iii. 5, 9. E. iii. 8, 18.—[2] E. iii. 8, 18.—[3] Ibid. ii. 2, 5, 7.—[4] Ibid. 14.—[5] Kynnynmound *v.* Cathcart, M. 5590. Macewan *v.* Thomson, 18th June 1793, M. 5596.—[6] Hawkins *v.* Hawkins, 23d May 1843.—[7] E. ii. 2, 14.

the character of the property, though it may be inferred that the granter intended them to be executed, will make the change.[1]

Personal Bonds expressly excluding executors, or those heirs who are entitled to the moveable property, from the succession, are heritable.[2] By our more ancient law personal bonds bearing interest were heritable, and the act which made them moveable left them heritable in questions between husband and wife, so that from them the wife is not entitled to provision as from her husband's personal estate.[3]

Titles of Honour and office, which are to continue and be succeeded to after the death of the holder, are called heritable,[4] although the rules of succession applicable to them form a peculiar code, with which the laws affecting the succession to property are connected only by analogy.

Rights bearing a Tract of future Time.—It is a general principle laid down by the authorities, that "all rights bearing a tract of future time are heritable;" that when they are beneficiary the heir to the heritage succeeds to them, and when they are burdens they fall on him.[5] The expression applies to payments or other rights which arise periodically, or in any other continuous form, without having reference to a capital, as an annuity.[6] It is said to be for this reason that leases are considered heritable, and it is held that leases of personal property—for example, of tolls or customs, would come under the same rule.[7] It has been held that for the same reason patent rights and copyrights ought to be heritable,[8] and it is remarkable that there has never been any decision in relation to the former. Copyrights are now moveable by statute. (*See Chap.* V. *Sect.* 1.)

Periodical Payments.—In drawing the distinction between heritable and moveable, as applicable to periodical payments, it will be convenient to state in the first place the old received law, and then to mention an act of parliament which is supposed to have materially altered the law in questions of succession. The general rule is that whatever money has vested in any one's person, so that he has either obtained it, at the time when it was properly payable to him, or he has been a creditor for it, it is a moveable fund. When there are specific periods at which an annuity or other continuous right to receive money at periodical intervals is payable, the sum due

---

[1] Patrick *v.* Nichol, 7th December 1838.—[2] 1661, c. 82. E. ii. 2, 12.—[3] 1661, c. 32.—[4] E. ii. 2, 6.—[5] Ibid. 2, 6. M. St. cxli.—[6] Hill *v.* Maxwell, M. 5473. Robertsons *v.* Baillie, M. 5473.—[7] M. St. cxli.—[8] Ibid. B. C. i. 115.

for a survived term is said to have vested, but not the proportion due for the portion of the unexpired term.[1] Rents of lands, whether they be paid or not, vest at the legal terms of Whitsunday and Martinmas, so that after the expiry of the former a half year's rent, and after that of the latter a whole year's rent is said to have vested.[2] If it is stipulated that the rent is payable by anticipation, or at the term of entry, the money so paid is moveable.[3] In grass farms the same principle is applied; the rent is said to be for the crop of a year, not the possession during any shorter period; and so, though the rent be payable half at Martinmas and half at the ensuing Whitsunday, the whole vests at Martinmas.[4] It is ruled that in such holdings a half-year's rent vests from the entry at Whitsunday.[5] In house rents the rule is practically the same—the rent for the current half-year is held to have vested from the lapse of the preceding term of Whitsunday or Martinmas.[6]

The Apportionment Act.—In 1834, an act was passed, generally supposed in its application to be limited to England, and to be intended for the adjustment in that country of questions as to rights in annuities, rents, and other periodical payments, corresponding to portions of unexpired terms. Owing to the use of the terms "United Kingdom of Great Britain and Ireland," it was found, after some difference of opinion, that the second section of this act applies to Scotland.[7] This decision is under appeal to the House of Lords. The section of which it would be difficult to describe the ultimate practical effect, if it shall finally be viewed as part of the law of Scotland, is as follows:—"And be it further enacted, that, from and after the passing of this act, all rents, service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable, or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so, and in such manner, that on

[1] Dalhousie *v.* Gilmour, M. 15915.—[2] E. ii. 9, 64. Hunter, ii. 309.—[3] Queensberry *v.* Montgomery, 18th Feb. 1814.—[4] Johnston *v.* Annandale, M. 15913. Pringle *v.* Pringle, M. 5419. Hunter ii. 316.—[5] Elliot's Trustees *v.* Elliot, M. 15917.—[6] Binny *v.* Binny, 28th Jan. 1820. King *v.* Jaffray, 24th Jan. 1828. [7] Bridges *v.* Fordyce, 7th March 1844.

the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments, as aforesaid, or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a portion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances or deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his, or her executors, administrators, and assigns, shall have such and the same remedies at law, and in equity, for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, if entitled thereto; but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned part specifically, as aforesaid, but the entire rents, of which such portions shall form a part, shall be received and recovered by the person or persons who if this act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law, or in equity."[1]

Stock.—This term is applicable to many very dissimilar proprietary rights, having a general chain of connexion and resemblance, if we take at one extremity the public funded stock which represents the security for the payment of the interest of the national loans, and passing through bank, railway, and other shares where joint stock partnership is a feature, come to ordinary stock in trade. Stock in the public funds is moveable property by the several statutes for its regulation,[2] and has been found to be so at ordinary law.[3] A portion of the securities for the national debt is in an un-

[1] 4 & 5 Wm. IV. c. 22, § 2.—[2] See 7 & 8 Vict. c. 4, § 14, and c. 5, § 12.—[3] Hog *v.* Hog, M. 5479.

funded form, that is to say, instead of being held in the form of a perpetual annuity, convertible into a principal sum only by means of a sale, it is repayable at par by government. The form of investment of this stock is in Exchequer bills, which are issued from time to time by authority of parliament. They represent generally the advances made by the Bank of England in anticipation of the taxes. Notice of the time at which they are paid off is given by advertisement. They are for various sums, bearing different rates of interest at different times, and are transferable by delivery.[1]

In the acts of incorporation and deeds of partnership of joint stock banking and other companies, it is usual to provide that the stock shall be moveable property, and in the late act containing clauses to be inserted in joint stock company acts, it is provided that all shares "shall be personal estate."[2] It seems, however, to be established as fixed law, that all property which is in the form of a transferable share of a joint stock company is moveable, though a material part of the value of the stock should arise from heritable property in the possession of the company.[3] The line cannot be so clearly drawn in the case of private copartnerships. The very essence of the partnership may be of an heritable character, as where two conterminous proprietors join in working mines on their ground, or in a salmon fishery in a common stream. It is held, however, that in an ordinary trading partnership, when an heritable subject forms part of the common stock, and is used for trading purposes, it is moveable.[4]

CHAPTER II.

CONSTITUTION OF RIGHTS IN LAND.

SECT. 1.—*General Explanations.*

THERE are two kinds of interest in all landed property,—The property itself, simply so called, and the Superiority. The monarch is, by presumption of law, superior of all the land of the country. Those who hold directly of him are called Freeholders;—a class of persons formerly distinguished from other citizens by their important political privileges. Between the monarch and the actual holder of the land there

[1] 48 Geo. III. c. 1. 8 & 9 Vict. c. 23.—[2] 8 & 9 Vict. c. 17, § 7.—[3] Murray *v.* Blackwood, M. 5478. Dalrymple *v.* Halket, ib.—[4] Corse and others, petitioners; and Sime *v.* Balfour. M. *Heritable and Moveable*, App. Nos. 2 and 3. Minto *v.* Kirkpatrick, 23d May 1833.

may be one or more superiors. So early as the year 1290, a statute was passed in England prohibiting vassals from feuing out their lands to be held under themselves; but permitting them to dispose of their rights by putting the purchaser in their own place, and letting him hold of the same Superior.[1] From that period no more Superiorities were created in England, for if a man holding simply of the crown disposed of his land, he did so by relinquishing all connexion with it, and putting another person in his place. An act for a similar purpose is said to have been passed by the parliament of Scotland; but if it was so, it was not long obeyed, as the practice of Scotland has always permitted sub-infeudation.[2] Land may therefore, with us, be transferred, either by putting the person to whom it is transferred in the situation of the person who transfers it, or by the latter still keeping up a connexion with the property, and allowing the new holder to enjoy it with that reservation. The latter form is called "constituting a Fee," for by it a new right of property is brought into existence. As all land rights either have been or are presumed in law to have been brought into existence in this manner, the method of constituting a fee may be discussed on the present occasion, that of transferring it belonging to another place.

SECT. 2.—*Nature and Constitution of a Fee.*

Of old, a Fee, or the right which a Lord might give his vassal in connexion with the lands over which he held authority, was granted merely during the life of the Vassal, and for military service. Hence, as there would naturally be a choice of the person on whom it was bestowed, the son did not, as a matter of routine, succeed to his father, and the vassal could not sell or otherwise dispose of his fee without the consent of the superior. When the fee became hereditary, as a minor could not fulfil the warlike duties required from the vassal, the superior took possession of it during his minority. The value of this right, on the part of the superior, was afterwards commuted into an annual payment, in which case the fee was said to be held in Taxed Ward. While the military or Ward tenure existed, the vassal might incur Recognition, or a forfeiture of his estate to his superior, under certain circumstances. The superior was entitled to a sum proportionate to the value of the estate, called the Avail of Marriage, exigible when an unmarried vassal succeeded. If the superior named a wife for his vassal, and the vassal refusing her married another woman, he became liable in what was termed

[1] 18 Ed. I. c. 1.—[2] Bell on Completing Titles,—Introduction.

the Double Avail of marriage. In 1747, the ward or military tenure was abolished as a system dangerous to the public tranquillity, and such fees as were held ward of the crown were converted into Blench holdings, and those held of subjects were converted into Feu holdings, for which a yearly sum was made payable to the superiors as a recompense for such of their casualties as were abolished.[1] It is necessary to explain these two sorts of fees, the only ones which now exist.

Feu-farm and Blench Holdings.—By the principle of the feudal system, it was impossible for any one to give an estate to another in full property, and without any dependence on a superior. To evade these limitations of the commerce in land, and create estates as nearly free as possible, fees were granted to be held on conditions merely nominal, such as the annual payment of a penny, a peppercorn, &c. These were termed Blench holdings. Feu-farm holdings are the ordinary tenures of the present day. Like Soccage in England, such a fee is held for a valuable consideration instead of warlike services, and is generally granted as an ordinary commercial transaction. Another species of tenure called Burgage tenure will be afterwards explained. (*See below Sect. 5.*)

Casualties.—It will be perceived that by these several arrangements there were certain advantages which accrued to a superior, not continuously or at regular intervals, but as the result of incidental circumstances. These were termed Casualties of Superiority. There is at least one casualty of superiority still in existence and operation. It was mentioned that in military holdings, the superior was entitled to hold the fee, or to be paid an annual sum instead of it during the minority of the vassal heir. In the same manner in other holdings, if the heir did not renew the investiture immediately on his ancestor's death, the superior could enter on the fee till he did so. This was commuted into a tax, which the heir had to pay from the period of his ancestor's death, till he is cited by the superior in an action called "An Action of Declarator of Non-entry." The non-entry duties which are demanded by this action are limited to the "Retour Duties."[2] The lands which held ward of the crown, and now hold blench, pay one per cent. of the valued rent as non-entry duty.[3] When lands are held feu, the non-entry duties consist of the yearly feu-duty, which the superior is entitled to otherwise, so that in that instance the casualty is no additional burden.[4] From the moment of citation, however, the

[1] 20 Geo. II. c. 50.—[2] E. ii. 5, 29, *et seq.* Jur. St. i. 451, *et seq.* iii. 186.—[3] 20 Geo. II. c. 50, § 2.—[4] S. H. S. ii. 193.

non-entry duties are chargeable at the full rent of the fee, up to the time when the heir shall enter.[1] Where the vassal enters himself heir in the regular manner, he has to pay a casualty to the superior, called "relief," which came into existence in the form of a composition for relieving the fee out of the hands of the superior.[2] A casualty of a somewhat similar nature generally falls to the superior on the entry of a purchaser when the fee is sold, but this will be explained below. There are other casualties, chiefly antiquated or of merely partial and occasional incidence, which need not be explained.

SECT. 3.—*Feu-charter.*

The deed by which a fee is brought into existence, or by which the superior authorizes a person to hold lands of him as his vassal, and entitles the vassal to be put in personal possession of such lands, is called a Feu-charter. It consists in general of the following clauses. 1. The Narrative Clause, containing the names and designations of the parties correctly set forth, which is immediately followed by, 2. The Cause of Granting,—generally a sum of money, and a feu-duty either real or nominal. 3. The Dispositive Clause, which states that the lands are transferred from the granter and his heirs to the vassal and "his heirs and successors," or to the vassal and any particular series of heirs. The lands are in this clause accurately and minutely described. 4. The *Tenendas*, mentioning the kind of feudal tenure by which the lands are to be held, which is generally feu-farm. 5. The *Reddendo*, which fixes the sum to be given as feu-duty or otherwise, and generally the sum to be paid instead of casualties. (*See the preceding Section.*) 6. Clause of Warrandice, which, having reference to the fee as a mere object of commerce, may better be considered under the subject of the sale of a fee. 7. Assignation to the Title-deeds and to the Rents, a temporary right to enable the vassal to enjoy the property, until he makes his right real and exclusive by the process of infeftment to be afterwards described. 8. Warrandice of the Assignation to the Title-deeds and Rents. 9. Clause of Registration, a clause common to most descriptions of deeds. A feu-charter can only be registered for preservation, and only in the books of the Court of Session. 10. Precept of Sasine, by which the superior empowers the vassal to be infeft. The form of this clause is now provided for by act of parliament.[3] The nature of this ceremony will be explained

[1] S. H. S. ii. 194.—[2] Ibid. 196.—[3] 8 & 9 Vict. c. 35, § 5.

in the next section. The last clause is the Testing Clause.*[1] It is usual to have a clause relieving the vassal of all arrears of public burdens.

When the crown is superior, and a charter is given, renewing the investiture in some new holder, the clauses are of a similar character, but the charter has to pass through certain forms, to the end that it may be revised by the judge acting in Exchequer; a duty which was performed by the Barons in the old Exchequer Court. The clauses examined in the Revision are the *Dispositive*, for the purpose of checking any attempt to enlarge the grant; and the *Tenendas* and *Reddendo*, that the tenure may not be altered, or the services reduced. The revisal and authority to proceed with the investiture are certified by a memorandum called a Signature.

SECT. 4.—*Infeftment and Registration.*

A Charter constituting a fee, or a Disposition conveying one after it is constituted, is said to be but a mere personal right. In as far as the granter is personally concerned, he is liable to an action to implement what he has done, by letting the vassal or purchaser take possession of the property; the latter, however, has not got a "Real right," which, like possession in purchased moveables, makes him proprietor, notwithstanding any other bargains which the seller may have entered into concerning them. As land cannot be delivered into the hand like moveables, a symbolical process has been invented, for declaring that real and personal possession is taken of it, and the person who first accomplishes this process has the best right to the feu, although his title may be later in date than another. So, if one has got a feu-charter as above, and another person has afterwads obtained a similar charter, in which he is the first infeft, his right will preclude that of the obtainer of the first charter.

Formerly the superior transferred the lands to the vassal, by attending on the ground and giving him possession in presence of the *pares curiæ*, or peers of his court, viz. the other vassals, who formed a kind of an assize for attesting all transactions connected with the lordship. Afterwards it was the practice for the superior to give directions to an officer of his court to make the investiture. When it became customary for the superior to oblige himself by a charter to

---

* As to the Testing of Deeds, see Part IV. Chap. II. § 4.—[1] Jur. St. i. 1-44.

invest his vassal, he did so in a separate deed, and thus there were two documents, the charter and the precept of sasine, which were afterwards united.[1]

Infeftment on the ground. — In after-times, when land became a subject of commerce, and the connexion between superior and vassal was that of buyer and seller, these important acts of investiture became mere ceremonies, which down to the late alteration in the law were however performed on the ground. It may be a useful introduction to the character and effect of the Infeftment, which is still a part of the system of Land titles, to describe the method in which the ceremony was performed anterior to the act of 1845. The law-agent of the party who had procured the charter might act as the party's Attorney, or if he were a Notary-public, he might act in the latter capacity, choosing some other person to act as attorney. He named a person to represent the Bailie or officer of the superior, and two persons to be witnesses of the ceremony. The whole party repaired to the ground, and there, the attorney acting for the vassal, produced the charter to the bailie, who desired the notary-public to read it. On its being read, the attorney required the bailie to obey the superior's precept, and give the vassal sasine in accordance with it. The bailie did so by delivering certain symbols into the hands of the attorney, according to the nature of the property, viz.:—For Feuholdings, earth and stone of the ground. For Teinds, or Tithes, a handful of grass and corn. For Annual-rents out of lands, earth and stone with a penny money. For Mills, clap and happer. For Fishings, net and coble. For a Patronage, a psalm book or Bible, and the keys of the church, and for Burgage subjects (*see below*), earth and stone of the ground, and the hasp and staple of the house-door. Seisin having thus been given, the attorney took instruments in the hands of the notary by giving him a piece of money, and called on him to prepare an instrument narrating the ceremony.[2] It is understood that during the earlier ages of the feudal system, the fact of infeftment having been given was left to the recollection of the *pares curiæ* or co-vassals. It is now certified by a notary-public and two witnesses, and, before the late change, was incorporated in a long and formal instrument, descriptive of the taking of the infeftment, and of the authority under which it was taken. It has to

[1] See Cragii Jus Feudale, lib. ii. Dieg. ii. Rosse's Lectures, vol. ii.—
[2] R. L. ii. 178, *et seq.* B. on C. T. 188. Jur. St. i. 24.

be observed that the witnesses do not merely attest the notary's signature, but the ceremony, and that they must subscribe each page of the instrument.[1]

Modern Method of Infeftment.—It is now unnecessary to proceed to the lands, or perform any ceremony, and infeftment is completed by presenting the warrant and other writings to a notary, who prepares and subscribes along with two witnesses an instrument of sasine, according to a form set forth in the schedule of the act.[2] A form is also provided in the act, for the precept which is the authority for the sasine.[3] When there is any error or defect, whether in the instrument or the recording of it, a new instrument may be taken and recorded.[4] Precepts issuing from the Exchequer, for infeftment in Crown-holdings, were formerly addressed to the sheriffs, but are by this act addressed to a notary-public.[5]

Registration.—The Register of Sasines and of Reversions—that is, rights of reversion of landed property—was appointed in 1617, improved in 1672, and perfected in 1693.[6] There is a principal register kept in Edinburgh, the rest of the country being divided into districts; and it is in the choice of the party to have the instrument recorded either in the General or the District Register. Volumes are issued from time to time from the General Register-house to the district recorders of sasines, along with each of which is a minute-book, in which are to be entered the contents of each deed recorded, with the date at which it was presented, &c. When the volume is filled, it is returned to the general register-house, along with the minute-book, a copy of the latter only being kept by the local registrar. Formerly instruments of sasine could only be recorded within sixty days after their date; they may now be recorded at any time before the death of the holder.[7] A Precept from Chancery is however void, unless the sasine be recorded before the first term of Whitsunday or Martinmas posterior to its date, without prejudice to a new precept being issued.[8] When a sasine is presented for registration, it is the duty of the keeper of the record to mark on it the date of presentation, and that date is held the date of recording.[9] The date is the criterion of preference, so that if there is more than one sasine taken by different individuals, the one first entered in the register is preferable,

---

[1] B. on C. T. 225.—[2] 8 & 9 Vict. c. 35, § 1.—[3] Ibid. § 5.—[4] Ibid. § 4.—[5] Ibid. § 6.—[6] 1617, c. 16. 1672, c. 16, § 32. 1693, c. 13 & 14.—[7] 8 & 9 Vict. c. 35, § 3.—[8] Ibid. § 6.—[9] Ibid. § 3.

though it should be taken after the other.[1] No erasure on the original instrument of sasine can be a subject of challenge, unless it is proved to have been made for a fraudulent purpose, or the record is found not to be conformable with the instrument as originally presented.[2]

SECT. 5.—*Burgage Property.*

Property holding burgage is held and conveyed by forms peculiar to itself, and more simple than those connected with other feudal property. It may be observed that all property within burgh is not Burgage, for there may be estates belonging to proprietors within the bounds of the burgh which the Charter of Erection did not interfere with, and the magistrates, as representing the community, may purchase and hold property in the same manner as individuals.

A Royal burgh holds directly of the crown. Formerly each burgess held personally of the crown, and paid duties directly to the Great Chamberlain; and when these duties came to be afterwards collected and paid over by the magistrates, the tenure continued the same. Hence, as every one holds of the same superior, there can be no sub-infeudation. Burgage property is held by the old tenure of Ward (*see* p. 52), obliging the vassal to watch and ward, and perform all other "services of burgh used and wont." It is not liable to the casualties of non-entry, relief, &c., on the death of the vassal (*see* p. 53), owing, it has been said, to the circumstance that the corporation is viewed as being itself the vassal.[3] There is no sub-infeudation, and thus when the property changes hands, there is no precept of sasine for infefting the new holder.[4] When there is a new investment, the magistrates, as commissioners for the crown, having received symbolical resignation of the holding, give it over to the new holder, or his attorney acting for him, by the symbols of earth and stone for ground, and hasp and staple for houses. The town-clerk acts as notary, narrating the resignation and the sasine in one deed, called an Instrument of Resignation and Sasine. This instrument, to constitute a preferable right, must be recorded in the register of sasines of the burgh by the town-clerk within sixty days.[5] This method of giving and recording sasine in burgage holdings has been left untouched by the late act.[6]

---

[1] 1693, c. 13.—[2] 6 & 7 Wm. IV. c. 33.—[3] Jur. St. i. 586.—[4] B. on C. T. 133.—[5] Jur. St. i. 604. B. on C. T. 134.—[6] 8 & 9 Vict. c. 35, § 7.

SECT. 6.—*Title by Prescription.*

Prescription, which will be found elsewhere discussed in as far as it extinguishes obligations, requires notice in connexion with the tenure of land rights. It does not, properly speaking, constitute a title, but it gives stability to a title which would otherwise be without foundation. It is founded on the possession of land for forty years, held continuously and uninterrupted by the person who pleads it, or by him and those through whom he holds his right. The possession must be on a charter and sasine preceding in date the commencement of the forty years, or upon an uninterrupted series of sasines proceeding upon Retours or Precepts of *clare constat*[1] (*see Part* III. *Chap.* I. *Sects.* 6 & 7). The title must be of such a character that, supposing its foundation anterior to the commencement of the forty years to have been unexceptionable, it would be valid and complete. While all the proceedings relating to the title within the years of prescription must thus have been such as indicate an absolute *bonâ fide* right, the inquiry goes no farther, and it is irrelevant to prove, even from the titles themselves, that they have originally sprung from one who was incapable of giving a valid right.[2] In one case a prescriptive title was sustained relative to coal, although originally it was excepted from the conveyance. "Having been inserted in the subsequent titles, and possession having been enjoyed for forty years, the right to the coal was held to be undoubted."[3]

Positive and Negative.—A distinction has been made between Positive and Negative Prescription, the former being the existence of the title and the possession for forty years in the person of the holder or his predecessors; the other the absence of possession during the same period on the part of the impugner. The existence of a title by the positive prescription, virtually presumes the negative prescription.[4] There are cases, however, in which the negative prescription may cut off a right to impugn a title before it has been fortified by the positive prescription. Thus where a party had been infeft within the years of prescription, on a title derived from an adjudication and sale prior to the commencement of the period, it was held that another party's right to challenge the adjudication and sale had prescribed.[5] The

[1] 1617, c. 12.—[2] Napier's Commentaries on the Law of Prescription, 56. Buccleugh *v.* Cunynghame, 30th Nov. 1826.—[3] Ibid. p. Lord Balgray in reference to Forbes *v.* Livingstone, 31st January 1822.—[4] Napier, 98.—[5] Cubbison *v.* Hyslop, 29th Nov. 1837.

consideration of the negative prescription properly belongs to the extinction of obligations, where it will be viewed in connexion with those operations in favour of the party which may interrupt it, and those circumstances, such as minority, which may suspend it.

It is frequently one of the effects of prescription to enable one who might have been bound to hold by one description of title to hold by another,—as where a series of heirs of entail have for forty years held under titles as absolute proprietors. It thus does not affect the prescription of one class of titles as against another, that the same line of persons would have been the holders whichever class of titles had been adopted; but it must appear clearly in the nature of the titles made up during the period of prescription in what capacity the owners have held.[1]

CHAPTER III.

SERVITUDES.

SECT. 1.—*Their Nature.*

SERVITUDES are divided into Personal, and Predial or Real. The former consist of pecuniary burdens on real property, as *Terce*, and *Courtesy*, and are considered in other parts of the work, *see Part* I. *Chap.* I. *Sect.* 11. The difference between the two is, that the former are rights or advantages held by individuals according to law or stipulation. The latter are rights and advantages held by one Tenement in respect of another, and so enjoyed by the owner or occupant. One of these, the servitude of Thirlage, having become a subject of importance in the law of landlord and tenant, is considered under that head. With regard to the other predial servitudes, they may be considered as rules founded on law, on compact, or on long usage, defining the use which one is entitled to make of his property with respect to neighbouring tenements. The old commentators, putting predial and personal servitudes under one head, discuss them as a branch of the feudal law; the later practical application of the doctrines, however, and a late enactment which has given to

[1] E. iii. 7, 6. B. vi. 2020.

sheriffs jurisdiction as to "the constitution or the exercise of real or predial servitudes,"[1] have tended to make the more important parts of the subject a matter of personal right. Much of the abstruseness of the subject, as generally treated, has proceeded from the disposition of the Roman lawyers to carry their divisions and analogies beyond the range of practical necessity. Thus, the circumstance that a running stream keeps passing from high to low ground, was involved with the right which one proprietor has from contract to the use of a road through the grounds of another, by an ingenious analogy which represented the proprietor of the lower ground as under an obligation to receive the water from the higher. The tenement to which the benefit of a servitude is attached is called the Dominant, that to which the obligation is attached, the Servient.

SECT. 2.—*Urban Servitudes.*

These are so termed from their being connected with edifices. Those which have any relation to practice are as follows:—

1. *Oneris ferendi*, or the obligation on a tenement which is under another to bear its weight.[2] In this simple form, it is one of the servitudes which need hardly have been created, as it is rather an incident of the nature of certain property than an obligation of any kind. In the chief circumstance in which it is of practical importance, the servitude may be said to be on either side, for the proprietor of the upper tenement must not increase its weight, or its liability to endanger the lower, nor must the proprietor of the lower do any thing to endanger the stability of the upper.[3] The proprietor of the Servient tenement is not bound to keep it in repair unless by special obligation. The proprietor of the Dominant tenement is entitled to repair the servient at his own expense.[4]

2. *Eavesdrop, or Stillicidium*, is a right to let the rain from a Dominant drop on a Servient tenement.[5] From the improvements in building and draining, the subject is now one of minor importance. It has been specially decided that no right of property over the ground on which the water falls is conveyed by a right of eavesdrop, and that the feudal proprietor may do what he pleases with the area, so long as

---

[1] 1 & 2 Vict. c. 119, § 15.—[2] E. ii. 9, 8.—[3] Ibid. Young v. Cuddie, 24th February 1831.—[4] E. ii. 9, 8.—[5] Ibid. 9.

he does not injure the Dominant tenement by preventing the rain from dropping from it.[1]

3. *Light, Prospect, and Freedom from being overlooked.*—Where any one of these is entered in the titles of the property, it is a separate obligation, the extent of which will depend on its terms.[2] A Servitude of light does not infer prospect, or prevent the owner of the servient tenement from building where he pleases, if he leave room for a proper supply of light.[3] The object of these servitudes is at once and fully accomplished by a prohibition to build, or to build above a certain height. A shed consisting of a flat roof, supported by cast iron pillars, was held to be an infringement of an obligation "not to erect any *building* whatever."[4] Even where there is no obligation, certain restrictions exist on the principle on which the law of nuisance is founded, that no one is entitled wantonly to use his property to the prejudice of his neighbours.

SECT. 3.—*Rural Servitudes.*

These have reference to land, and are chiefly as follows:—

1. *Passage*, by which the occupants of one piece of land have the privilege of passing through another. It is divided by lawyers into three grades,—Foot road; Horse road; and Cart or Carriage road. A fourth class has sometimes been added, called Loanings for cattle.[5] The right to public pathways, which belongs to the department of public law, has its foundation generally in this species of servitude.

2. *Aqueduct*, or the right of carrying water through a neighbouring tenement for the purpose of driving mills, irrigation, &c. Of the same nature is the right to have the water accumulated in a dam or reservoir on a neighbour's property.[6] It seems to be a principle that neither party can be bound to renew or repair such a work, farther than to the extent of keeping the bulwarks in order, which it would appear that the person deriving advantage should do. Either party may repair it if he feel it for his interest, and the dominant proprietor may at all times have access to it for the purpose of keeping it in repair.[7]

3. *Watering of Cattle*, consisting in the simple right of

[1] Scouller *v.* Pollock, 24th January 1832.—[2] E. ii. 9, 10.—[3] Ogilvie *v.* Donaldson, 5th February 1678, M. 14534.—[4] Magistrates of Edinburgh *v.* Brown, 17th January 1833.—[5] E. ii. 9, 12.—[6] Ibid. 13.—[7] Gray *v.* Maxwell, 30th July 1762, M. 12800. Carlyle *v.* Douglas, November 1731, M. 14524. Weir *v.* Glennie, 4th February 1882.

the proprietor of lands to water his cattle in streams belonging to another person.[1] The latter is entitled to cover his stream, if he leave space sufficient for a reasonable exercise of the privilege.[2]

4. *Common Pasturage* " is a right by which the owner of the dominant tenement is entitled to the use of the grass-grounds of the servient, for pasturing a determinate number of cattle proper to the dominant."[3] Where the right is not limited by writ, its extent may be ascertained by an action of *Souming* and *Rouming*;[4] and the rule seems to be, that the servient tenement must receive as many cattle for pasturage in summer as the dominant provides fodder for in winter.[5] It confers no right to make hay of the grass.[6]

5. *Feal* and *Divot*, or " the right one has of turning up feals or divots from the surface of the servient tenement, and carrying them off for thatch to his house, or for the other uses of the dominant tenement."[7]

For Thirlage, see this head in Index.

SECT. 4.—*Constitution of Servitudes.*

There is a distinction of servitudes into Positive and Negative. The former are those which allow the Dominant party to make use of the property of the Servient. The latter merely prohibit the Servient from doing certain acts to the disadvantage of the Dominant. The application of the division to the above cases will be easily perceived. A positive servitude cannot be constituted without possession or exercise, however it may be granted; a negative, not being capable of possession, can. A negative servitude from the same cause cannot be acquired by prescription alone; a positive can.[8]

A servitude does not require to be feudally incorporated with the title, by being entered in all infeftments, &c. (See above, *Chap.* II. *Sect.* 4.) It is sufficient that it appear in some writ or title.[9] (See above, *Chap.* II. *Sect.* 3.) This is law, only however in the case of the common and received servitudes enumerated in the law-books. It was found that a servitude could not attach to the proprietors of floors in a house to repair the roof, without being entered in the latest titles.[10] No

[1] E. ii. 9, 13.—[2] Beveridge *v.* Marshall, 18th November 1808.—[3] E. ii. 9, 14.—[4] Ibid. 15.—[5] Breadalbane *v.* Menzies, 15th June 1741, 18th November 1742. 5 Br. Sup. 710-724.—[6] Cuninghame *v.* Dunlop, 20th December 1836.—[7] E. ii. 9, 17.—[8] Ibid. 9, 3, 35.—[9] Ibid. 3. Gray *v.* Ferguson, 31st January 1792, M. 14513.—[10] Nicolson *v.* Melvill, 19th February 1708, M. 14516.

servitude can be acquired unless with respect to a dominant and servient tenement, and it is said that the public in general cannot acquire a servitude.[1] A corporation, however, in respect of its landed property, may acquire a servitude for its members, by prescription, as it was found where a royal burgh claimed the right of bleaching on private property for the inhabitants.[2] It has been decided, in an old case, that a similar right cannot be so acquired by a burgh of barony.[3]

Where the dominant and servient tenements come into the possession of the same person, the servitude is extinguished, and is not tacitly revived by their subsequent separation. It appears, however, that if the one tenement be held in absolute property, and the other by a limited title —as an entail, the mere union in the same person will not extinguish the servitude.[4]

CHAPTER IV.

PROPERTY IN BRITISH VESSELS.

SECT. 1.—*Requisites of British Privileged Vessels.*

The Ship.—A British privileged ship, which the owners are entitled to register as such, must be, 1*st*, of the build of the United Kingdom, or of the Isle of Man, or of Guernsey or Jersey, or some British possession; or, 2*d*, a lawful prize condemned, or a vessel forfeited for breach of the law for prevention of the slave-trade; owned by subjects of Great Britain in terms of the act.[5] A ship repaired in a foreign port at an expense beyond twenty shillings per ton on the burthen, loses the character of a British ship, unless the repair be rendered necessary from damage on a voyage, and to enable the vessel to proceed on her voyage and return to the British dominions. To enforce these provisions, the master of a ship repaired abroad must report the circumstance to the collector and comptroller of customs at the port of arrival, who, by direction of the commissioners of the customs, on

[1] Cochran *v.* Fairholm, 8th February 1759, M. 14518.—[2] Sinclair *v.* Town of Dysart, 10th February 1779, M. 14519.—[3] Feuars of Dunse *v.* Hay, 22d November 1732, M. 1824.—[4] Donaldson's Trustees *v.* Forbes, 1st February 1839.—[5] 8 & 9 Vict. c. 89, § 5.

their being satisfied that the repairs were necessary, certify that the ship's privileges are not forfeited.[1] A ship captured by or sold to foreigners loses her privileges, and can recover them only by the same capture or forfeiture, as above, which makes a foreign ship British.[2] A ship declared to be stranded or unseaworthy, and condemned by any competent court, permanently forfeits her privileges as a British ship.[3]

Ownership.—The owners must be subjects of Britain, and inhabitants of the United Kingdom or of the colonies, or partners of houses carrying on trade in the United Kingdom, or members of British factories.[4] The master and three-fourths of the crew must be British seamen, but if there be one British seaman for every twenty tons burthen, it is not necessary that the number of foreigners shall be restricted to one-fourth. In the coasting and fishing trade, the crew must be entirely British.[5] Ships under fifteen tons burthen employed in the coasting or inland trade, and ships not exceeding thirty tons burthen, and not having whole decks, employed in the Newfoundland fishery, are entitled to the privileges by the above qualifications, although not registered, if wholly owned and navigated by British subjects.[6]

The privileges so acquired consist of certain monopolies of the colonial and coasting trade, and of the unrestricted importation of certain enumerated articles for home consumption, which (besides other restrictions) cannot be so imported in foreign ships unless they be of the country of which the goods are the produce, or of the country from which they are imported.[7]

The rules by which a foreign ship is applied to its particular country are similar to those which characterize a British ship, viz. build or capture, three-fourths of crew natives or one for each twenty tons, &c., with an extension to British built ships, not prizes of war, so possessed and navigated, which may have the privileges capable of being enjoyed by any foreign vessels as above noticed.[8]

SECT. 2.—*Register.*

Before a ship is ready for sea, the property of it is in the same situation as that of any other moveable; but whenever it becomes fitted for its proper purposes, all rights connected

---

[1] 8 & 9 Vict. c. 89, § 7.—[2] Ibid. § 9.—[3] Ibid. § 8.—[4] Ibid. § 12.—[5] Ibid. c. 88, §§ 13, 17.—[6] Ibid. § 14.—[7] Ibid. § 2. See § 4.—[8] Ibid. § 16.

with it are, by a law extending over the whole of the British dominions, held under a system of registration, not very dissimilar to that which regulates landed property in Scotland. Where there is more than one owner of a vessel, the property is divided into sixty-four shares.[1] There cannot be more than thirty-two shareholders; but there is an equitable exception in the case of legatees, heirs, trustees, creditors, &c. succeeding to or having the management of shares, and so increasing the number of persons interested in the property; and joint-stock companies may hold shares registered in name of the company, by trustees, who must in every case be three in number at least.[2] Before registry, a declaration as to the build, burthen, master's name, ownership, &c. must be taken by the owner or owners, of whom no more than three are required to subscribe, and one is sufficient, if the others reside more than twenty miles from the port of registry.[3] A full account of the build and first purchase, under the hand of the builder, must also, in the ordinary case, be supplied before a registration can take place; but, if circumstances render this impossible, it may, on a proof of the particulars in some other shape, be dispensed with.[4] As a farther preliminary to registration, a survey is taken by persons appointed by the commissioners of the customs, in presence of the master, or any other person whom the owners may appoint to represent them. The tonnage is ascertained according to rules set forth in the latest registration act.[5] The vessel is then entered, with a narrative of the particulars so collected, at the port to which she belongs,—viz. that nearest to which the owners making the declaration before registry reside. If these dispose of their shares, or if the vessel be altered so as not to correspond with the description, the vessel must be registered again.[6]

A Certificate narrating the registry, with an account of the shares held by the several owners, on the back, is given to the master of the vessel as a testimonial of its bearing the character of a British ship. Security is given by the master and owners that the certificate shall be carefully preserved, and returned on the occurrence of any event which may render it no longer applicable.[7] If the certificate is lost, the commissioners may, on proof of such an event, cause it to be renewed, on security for the restoration of the lost one if recovered; and if it be impossible, from the absence of the

---

[1] 8 & 9 Vict. c. 89, § 35.—[2] Ibid. § 36.—[3] Ibid. § 13.—[4] Ibid. § 26.—[5] Ibid. § 15.—[6] Ibid. §§ 11, 31.—[7] Ibid. § 23.

parties, to accomplish the formalities necessary for obtaining a new certificate, an interim license is given.[1]

The entry on the register is the proof of the property of the ship, so that whatever transaction may have taken place, he who appears there in such capacity is considered by law the proprietor, and his creditors may attach accordingly.[2] The effect of this rule on the conveyance of vessels will be considered under the subject of Sale.

CHAPTER V.

COPYRIGHT IN LITERATURE AND WORKS OF ART.

SECT. 1.—*Statutory Rules.*

BY a late act (5 & 6 Vict. c. 45), the laws relating to the constitution and protection of literary copyright have been consolidated. The substance of the act will be given in the following summary, along with such law relating to copyright as still subsists under previous acts unrepealed.

Constitution of Copyright in Books.—The word "book," by the interpretation of the act, means "every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published" (§ 2). The copyright of every book published after the date of the act (1st July 1842) is to be in existence for seven years after the death of the author, and if the seventh year should elapse before the expiry of forty-two years from the publication of the work, then until the expiry of the forty-two years. Copyright in a book published after the author's death is to subsist for forty-two years from the date of publication, and is to be "the property of the proprietor of the author's manuscript" (§ 3).

Extension.—The extended period is to apply to copyrights existing under the old law at the time of the passing of the act, where they are held by the author or his representatives. If such a copyright, however, belong in whole or in part to "a publisher or other person who shall have acquired it for other consideration than that of natural love and affection," it is not to exist for the continued term, unless "the author

---

[1] 8 & 9 Vict. c. 89, § 29.—[2] Morton *v.* Black, 11th January 1843; M'Arthurs *v.* M'Brair, 20th June 1844.

of such book, if he shall be living, or the personal representative of such author, if he shall be dead," join with the publisher-proprietor in making an entry of the continued copyright in the Stationers' Hall Register, according to the first form provided by the act. The meaning of the term "personal representative" here used, may in some cases give rise to doubt. It is plain, from the term employed, and from a provision in the act, which makes copyright personal property, that it is the person who succeeds to the moveable, as in contradistinction to the successor to the heritable estate, who possesses the privilege. Where there is but one next of kin succeeding to the unattested moveable property, there can be no doubt that the privilege is in him. Where there is more than one so succeeding, it would appear that the concurrence of all is requisite. Where there is a regularly executed testament, appointing an executor, it would seem that he is the person entitled to concur in registering the extension. If the act viewed this concurrence as an article of sale, it would be held that it must go to the benefit of the succession generally, and that all who are interested therein —next of kin, legatees, and creditors—would have an interest in the disposal of the privilege. But it is not viewed as an article of commerce. One person only, the purchaser of the original copyright, is the person who may hold this extension of it, and the form enables him to take the privilege to himself, provided he has got the statutory concurrence. The author being dead, the fitting person to give this concurrence is the individual who represents him in all the privileges and obligations to which his moveable property is amenable. It would appear that the person who happens to be the representative at any given moment, between the author's death and the expiry of the old period of copyright, is the person entitled to concur in the continuance, and that it is not necessary, after the concurrence of a nearer representative of the author has been obtained, to produce that of the person who happens to be representative at the time of the expiry of the old copyright.

Periodicals, &c.—An important improvement is made in fixing the copyright of contributions to works which are produced by the joint efforts of various persons, in emendation of the very doubtful state of the law as it previously stood. The person who publishes or projects as proprietor, "any Encyclopædia, Review, Magazine, Periodical work, or work published in a series of books or parts, or any book whatsoever," is proprietor of the copyright of all contributions,

that are made to it on the understanding that he is to be their proprietor, and that are paid for by him. This privilege extends to works projected either before or after the passing of the act, and is to be the same as the author's copyright, with this difference, that in the case of contributions to "reviews, magazines, or other periodical works of a like nature," on the expiry of twenty-eight years from the first publication, the right of republishing them separately is to revert to the author during the enlarged period of copyright appointed by the act. It is not expressly said that the author's representatives are to have such a right. During the original copyright of twenty-eight years, the proprietor-publisher is not entitled to publish any such contribution separately, without the consent of the author, or those having right from him. These provisions are not to affect the right of any author to print his contributions in a separate form, "who by any contract, express or implied, may have reserved, or may hereafter reserve to himself such right" (§ 18).

Universities.—A perpetual copyright is held by universities in any MSS., deposited with them in order that the profits of publication may be applied to the advancement of learning.[1] The privilege ceases unless the books "are printed only at their own printing-presses within the said universities and colleges respectively, and for their sole advantage."[2] This right is left untouched by the consolidation act (§ 27).

Lectures.—Public lecturers have a copyright,—protecting their lectures from publication by those who have obtained liberty to hear them, by the payment of fees or otherwise.[3] When such lectures have been published with the sanction of the authors, a copyright is created in them of the same nature and duration as that of other books.[4]

Dramatic and Musical Works.—Dramatic authors are protected against the performance of their works on the stage without their consent. The right is absolute and indefeasible as to all pieces which are not printed and published. As to those which are published, it was fixed at the old copy-right period, and thence during the author's life if he be alive. Those published more than ten years before the passing of the act (10th June 1833) are not protected.[5] By the consolidation act, the privilege is extended during the additional term of copyright created by the new act, and musical compositions are placed in the same position. The first performance is in both cases,

---

[1] 15 Geo. III. c. 53, § 1.—[2] Ibid. § 3.—[3] 5 & 6 Wm. IV. c. 65, § 1.—[4] Ibid. § 4.—[5] 3 & 4 Wm. IV. c. 15.

for the purposes of the act, to be deemed the equivalent of the publication of a book (§ 20).

Engravings.—Those who invent or engrave, or cause to be invented or engraved, Works of Art, Maps or Plans, on plates, enjoy a copyright in them for twenty-eight years from the day of publication.[1]

Sculpture.—Copyright is constituted in Sculpture, in so far as respects publication by Casts. It exists for fourteen years from the first publication,[2] and at the end of that time for another similar period, if the artist be alive and has not disposed of his right.[3] The name of the proprietor, and the date, must be marked on each cast or copy before publication.[4]

International Copyright.—By 7 & 8 Vict. c. 12, provision was made for enabling the crown, by order in council, to extend the privileges of the British copyright to works first published in any state which gives a like privilege to the productions of this country. The privilege may apply to Books, Prints, Sculpture and other works of Art, Music, and the Drama. It is specially provided, that nothing in the act is to be held to prevent the publication of a translation of any work enjoying copyright by virtue of the act. It provides also, that no work published abroad subsequently to the passing of the act (10th May 1844), shall enjoy any copyright in the British dominions, unless in terms of the act. An order in council of 27th August 1846 ratifies a treaty with Prussia, creating an international copyright for the ordinary British period, in relation to Books, Prints, Sculpture, Music, and The Drama.

Registration and Transfer.—A register of copyrights is appointed to be kept at Stationers' Hall, open to inspection for a fee of one shilling for every entry searched for or inspected. Certified and probative extracts are issued for a fee of five shillings each. Dramatic and musical pieces may be entered, whether they be in manuscript or not (§§ 11, 22). The proprietor of any copyright may, paying a fee of five shillings, enter in the register "the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, and of any portion of such copyright," in the form provided by the schedule of the act. The publishers of encyclopædias and serial and periodical works, may obtain the benefit of registration by entering the title, and the time of publishing

[1] 8 Geo. II. c. 13. 7 Geo. III. c. 38, §§ 1, 7. 17 Geo. III. c. 57.—[2] 54 Geo. III. c. 56, § 1.—[3] Ibid. § 6.—[4] Ibid. § 1.

the first number, or the first after the passing of the act, with the name and address of the proprietor and those of the publisher (§ 19). Entry may be made of a dramatic piece or musical composition in MS., by the title and the names and designations of the author and proprietor (§ 20). A registered proprietor may assign his interest as registered, by an entry of the assignment and the name and designation of the assignee, also in the terms of a form provided by the act. "And such assignment so entered, shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed" (§ 13). The assignment of a dramatic piece or musical composition, does not convey the right to perform it, unless the entry specify such intention (§ 22). Owing to the Stationers' Company being solely within the jurisdiction of the English courts, the remedy, in the case of any entry held to be unjust, is by application to one of the three Common law Courts of Westminster Hall (§ 14).

Privileged Libraries.—The British Museum is entitled to a copy on the best paper—of every book published for the first time, of every edition with alterations, and of every edition of a book of which a preceding edition has not been lodged there (§ 6). The following libraries are entitled each to an ordinary sale copy of every new book, and of every edition with alterations or additions, viz.: the Bodleian at Oxford; the Public Library at Cambridge; the Advocates' Library at Edinburgh; and Trinity College Library at Dublin (§ 8). The copy on best paper for the British Museum is deliverable within three months after publication (§§ 6 & 7). The copies for the other libraries are deliverable within one month after a demand made in writing, within the year after publication, by an authorized officer of the Stationers' Company or of the privileged libraries respectively (§ 8). A publisher may deliver his copies at the libraries, instead of sending them through Stationers' Hall, and is entitled to a receipt for them (§ 9). In the case of default, the librarian or other authorized officer of the library may recover, besides the value of the book, the sum of £5 for each book withheld, either on summary conviction before two justices of peace, or by an ordinary action (§ 10).

Miscellaneous.—It is provided that copyright is to be considered as personal or moveable property (§ 25). If, after the death of an author, the proprietor of the copyright of his book refuses to publish it, or to allow it to be published,

the judicial committee of the privy council may, for the benefit of the public, grant license on application, under such limitations as they may deem fit, to publish it (§ 5).

The method of redress for the infringement of copyright is considered under the head of Remedies for civil injuries.

SECT. 2.—*Nature and Principles of Literary Property independently of Statute.*

It has been decided by the House of Lords that there exists no copyright in England, except by virtue of the statutes conferring it,[1] and the same has been ruled both by that tribunal and the Court of Session in regard to Scotland.[2] The circumstances by which the law has been accustomed to identify those cases to which the statutory privileges of copyright apply have now to be described.

In the case of literary productions in which the original efforts of the author's intellect are added to or mingled with productions previously existing, it will be often very difficult to determine whether and to what extent copyright is constituted. Separate notes and illustrations added to a book are undoubtedly copyright.[3] It appears that improvements in the arrangement of the parts, typographical corrections, and slight alterations, made on a work which is not copyright, will not exclude others from reprinting the work so improved. This was found in the case of Dr Channing's writings, which were not copyright in this country. The amendments were made by himself, and he received a pecuniary acknowledgment of them. It was stated that the actual authorship alterations made by him amounted to only seventy-six in number, and that when collected together they would not fill half a page out of 568, to which the collection extended.[4] An abridgment of a book, if it be a separate literary effort, applicable to particular purposes,—say for the use of those who cannot afford time to read the larger work, or to form an introduction to it,—will be a foundation for copyright, even as against the original author. An injunction against printing an abridgment of the tale of Rasselas, which merely contained the narrative, and not the moral reflections of the original, was refused.[5] Where a work, however great the labour it has cost, is such that any person going through the same process will arrive at the

[1] Donaldsons *v.* Beckett, 1774. 2 Bro. 129. Bur. 2408.—[2] Hinton *v.* Donaldson, 1773. 5 Br. Sup. 508.—[3] Godson, 348.—[4] Hedderwick *v.* Griffin, 20th January 1841.—[5] Dodsley *v.* Kinnersley, 15th June 1761, Amb. 403.

same result, it is difficult to establish an exclusive right. Such is frequently the case with road-books, directories, interest tables, and other tables of calculation, a class of works which frequently form very valuable articles of copyright. On the one hand, the public in general must not be excluded from such a field, because one individual has occupied it. On the other hand, one person is not to take advantage of the ingenious arrangement or the labour of another. In the case of ordinary literary productions, the circumstance of the same ideas being expressed in the same words is generally of itself evidence that two works are the produce of the same mind. Where every one will reach the same result by the same means, and these means are obvious and in common use, a similar conclusion by no means follows. In the one case, the right may be said to be in the thing produced; in the other, in the way of producing it. In the latter case, then, the evidence is generally extraneous, tending to show that the one party has taken advantage of the labours of the other. The use of one work, as "copy" to print the other from, is perhaps the best evidence that can in such a case be obtained of plagiarism. The recurrence in the plagiarism of mistakes and peculiarities in the original, and the mechanical adoption of any peculiar arrangement, which circumstances show that the plagiarist does not understand the nature of, and cannot follow out, constitute evidence.[1] When, a book being original, another appears which is in every respect an exact model of it, there can be little doubt of plagiarism;[2] indeed, in such a case, if the writer of the second should go through the whole labour of calculation, &c., for himself, he has no right to adopt the model of another work, and so profit by its saleable character.

It was held in one case, that schoolbooks for teaching children to read, consisting of the alphabet, initial lessons in the spelling of words, extracts from other books, and other matters which partake more of the character of mere arrangement than of literature, are entitled to copyright.[3] "Books of this sort," said Lord Mackenzie, "are entitled to the protection of the law. When such books are printed, and another man prints the same thing, the law will apply." The difficulty of making out a charge of piracy in such cases was, however, shown in this instance; and the nice distinctions on which the matter must depend were thus stated in

[1] Lord Kenyon in Cary *v.* Longman & Rees, 1801. 1 East. 358. Godson, 237. Maugham, 135.—[2] Lord Erskine in Matthewson *v.* Stockdale, 27th February 1806. 12 Vesey, 270.—[3] Lennie *v.* Pillans, 18th Jan. 1843.

the interlocutor of the Lord Ordinary (Jeffrey):—"That in respect the said works do necessarily consist, in a great degree, of extracts from, and repetitions of, previous publications by other authors, and can, for the most part, be entitled to protection only in so far as they exhibit an original arrangement, selection, abridgment, or amplification of such borrowed materials, the claim of copyright, and the charge of piracy, can only be sustained in relation to such works, by proof of large and precise copyings of such selection, arrangement, abridgment, or amplification, as can alone give the character of originality, and whole consequent value to any such publications."

Translations.—In the general case there is a copyright in the translation of a book in a foreign tongue. It is a prevailing opinion with lawyers, that, supposing a book in a foreign language to give its author an undoubted copyright in this country, there may be a separate copyright in a translation, which the translator may defend against the author.[1] There has, however, been no case directly to the point, and the only case, a very old one, which bears upon it, assumed the following aspect. A scientific book had been published in the Latin language, and the proprietor of the copyright applied for an injunction against a translation. The opinion of the Lord Chancellor was, that in ordinary circumstances there would be a free copyright in the translation against which there could be no injunction; but, he continued, "yet this being a book which, to his knowledge (having read it in his study), contained strange notions, intended by the author to be concealed from the vulgar in the Latin tongue, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing of it in English."[2] This is a question which will be open for full consideration, if a case should occur, where the translation comes into competition with the original copyright work. Books of value, written in English, are frequently translated into foreign languages, but it could scarcely be said that the privilege of translation would extend to allowing a retranslation of such a work into English, to compete with the original in our own market.

Foreigners.—In England, doubt has been lately thrown on the capacity of a foreigner not resident in this country to hold copyright, unless under the act as to International copy-

[1] Godson, 347. Maugham, 75.—[2] Burnett *v.* Chetwood, 1720, cited 2 Meriv. 441.

ght. On the one hand it has been found that a foreigner siding in Britain, and first publishing his work in the empire, has copyright; while on the other side, it has been ound that a foreigner whose work has first been published broad, cannot subsequently acquire a copyright for it in his country.[1] The question still left in doubt is, whether, f such a work were first published in this country, its author emaining abroad, it would have copyright? The preponderance of opinion is decidedly in favour of such a copyright. Where the first publication is abroad, the cases above cited how that neither the Author nor his Assignee can hold copyight in this country; but in one case, an Assignee, a British ubject, was protected by Injunction in the possession of the opyright of a work first published by him in this country, hich he had bought of the author, a foreigner living abroad.[2]

There is said to be copyright in the form and title of a work.[3] An infringement in this case is not so much to be considered n the light of an appropriation of an author's labours, as a raudulent attempt by one person to make his commodity ass off as that of another.

CHAPTER VI.

Copyright in Designs.

By 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, the law of exclusive privileges applicable to all designs which, whether n texture or in shape, or by the arrangement of colouring natter, are intended by their beauty or originality to give alue to articles of commerce, was consolidated. The application of different periods of exclusive privilege to different classes of designs is arranged to the several species of lesign as follows:—"Whether such design be applicable o the ornamenting of any article of manufacture, or of any ubstance, artificial or natural, or partly artificial and partly atural, and that whether such design be so applicable or the pattern, or for the shape or configuration, or for he ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing, or by painting, or by em-

[1] Chappell v. Purdy, 12th June 1845. 23 Law Journ. Exch. 258. Clementi . Walker, 2 B. & C. 861. Guichard v. Mori, 9 Law Journ. Chanc. 227.—D'Almaine v. Boosey, 1 You. & Coll. 288.—[3] Maugham, 126, 127. Hogg . Kirby, 8 Vesey, 215.

broidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined; be it enacted, that the proprietor of every such design, not previously published either within the United Kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substances as aforesaid, provided the same be done within the United Kingdom of Great Britain and Ireland, for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this act; viz. where the design is applicable to ornamenting any article of manufacture contained in the first, second, third, fourth, fifth, sixth, eighth, or eleventh classes, for three years; where it is applicable to ornamenting any article of manufacture contained in the seventh, ninth, or tenth classes, for nine calendar months; where it is applicable to ornamenting any article of manufacture or substance contained in the twelfth or thirteenth classes, for the term of twelve calendar months (by 6 & 7 Vict. in the cases in class fourteen, for three years):

Class 1.—Articles of manufacture composed wholly or chiefly of any metal or mixed metals:

Class 2.—Articles wholly or chiefly of wood:

Class 3.—Articles wholly or chiefly of glass:

Class 4.—Articles wholly or chiefly of earthenware:

Class 5.—Paper-Hangings.

Class 6.—Carpets and (6 & 7 Vict. c. 65) floorcloths:

Class 7.—Shawls, if the design be applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics:

Class 8.—Shawls not comprised in class 7.

Class 9.—Yarn, thread, or warp, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced:

Class 10.—Woven fabrics, composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics; excepting the articles included in class 11:

Class 11.—Woven fabrics, composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue

or textile fabrics, such woven fabrics being or coming within the description technically called furnitures, and the repeat of the design whereof shall be more than twelve inches by eight inches:

Class 12.—Woven fabrics, not comprised in any preceding class:

Class 13.—Lace, and any article of manufacture or substance not comprised in any preceding class."

Class 14.—(6 & 7 Vict. c. 65) "Any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape and configuration or only for a part thereof."

Designs for sculpture are expressly excluded, being regulated by separate acts. (*See* p. 70.)

Registration.—The acts provide a system for registering designs, under the control of a registrar appointed by the Board of Trade.

The registrar is, in the cases under the act of 5 & 6 Vict., to receive two drawings or prints of each design, with a note of the class of copyright claimed for it, and of the name and designation of the individual or firm claiming the privilege. These duplicates are to be each marked by him with a serial mark, and one of them being returned, the other is filed in the office (§§ 14, 15). The copy returned is accompanied by a certificate from the registrar, which is evidence of the following facts:—The design, and the proprietor's name and proprietorship; the commencement of the copyright; the originality of the design; and the fact of the rules of the act being complied with (§ 16). The registration is essential to the existence of the copyright. All the articles on which the design is used must have on them the letters Rd, with the registrar's serial mark,—on the edge, if the article be a woven fabric, and in any convenient place if it be not, the mark being either impressed on the fabric or attached to it by a label (§ 4).

In the cases in class 14, two precisely similar drawings or prints of the design must be delivered to the registrar, with an intelligible description in writing, the title of the design, the name of every proprietor, either as individuals or companies, with their places of abode or business, or their other places of address. The representation, the description, the title, &c., as above, must all appear on the face of one sheet not exceeding in size 24 inches by 15, with a blank space of

6 inches by 4 for the certificate. The picture must be accurately proportioned, and the description must distinguish any parts that are not original. The copies are numbered according to succession in the register; and one of them being retained, the other is returned,—6 & 7 Vict. c. 65, § 8.

The right to the privilege is a right of property, which may be sold or disposed of in ordinary commerce. The inventor of the design is the proprietor, unless he have been employed to execute it, in which case the employer is proprietor (5 & 6 Vict. § 5). There are forms in the act of 5 & 6 Vict. for the transfer of designs, so that, on the presentation of the act of transfer, the registration may be altered to suit the change of property; and there is a form by which the registrar may be required, on satisfactory evidence being adduced, to alter the registration of proprietorship where it has changed hands otherwise than by sale (§ 6). In respect to the act of 5 & 6 Vict., registered designs, of which the copyright has expired, may be inspected by any one paying the usual fee. No copyright design, however, is inspectable on the register, "except by a proprietor of such design, or by any person authorized by him in writing, or by any person specially authorized by the registrar, and then only in the presence of such registrar, or in the presence of some person holding an appointment under this act, and not so as to take a copy of any such design or of any part thereof" (§ 17). In respect to the subsequent act of 6 & 7 Vict. c. 65, the index and the designs are open to general inspection, unless in the case of ornamental designs. No design, however, of which the copyright is unexpired can be inspected, unless in the company of an officer acting under the act, and in such a manner as to preclude a copy being taken (§ 10). The registrar may refuse to register a design which he thinks contrary to public morality or order, or which is intended only for a label or covering (§ 9).

By 6 & 7 Vict. c. 72, a stamp-duty of £5 is imposed on all designs registered under the act 6 & 7 Vict. c. 65.

The remedies for piracy of designs will be found under the head of Remedies for Civil Injuries.

CHAPTER VII.

PATENTS.

SECT. 1.—*Nature and Process of obtaining.*

Nature.—A PATENT is a privilege granted to the inventor of some new "manufacture," or vendible commodity, giving him for a certain limited period a monopoly in the invention, so that none but he, or those authorized by him, can prepare it for sale. The power of granting patents is part of the royal prerogative. In England it was retained when the power of the crown to grant monopolies in other cases was abolished by act of parliament,[1] and the practice, as it was followed in that part of the country, seems to have been tacitly adopted with regard to Scotland. By the original act the period beyond which the crown cannot grant the privilege is fourteen years; but by late acts a patent may be prolonged on special application.[2] (*See* p. 81.)

Procedure.—A patent being in the eye of the law an act of grace on the part of the crown, the procedure commences with a petition from the inventor, narrating that what he has invented has never before been used, and that he believes it will be of general benefit and advantage.[3] He then prays for the usual privilege of "the sole working, constructing, making, selling, using, and exercising of the said invention," specifying the parts of the kingdom to which he wishes the patent to extend.[4] The petition must be accompanied by a declaration of its truth.[5] On being presented at the Home Office it is referred to the law-officers of the crown for that division of the empire for which the patent is desired (viz. in Scotland to the Lord Advocate), and consequently, if a patent is desired for each of the three kingdoms, the petition will be referred to the law-officers of each, who generally report in its favour as a matter of form, unless a 'Caveat' have been entered.[6] Since the reign of Queen Anne it has been usual to insert a provision that the patent should only be granted if the petitioner shall lodge a Specification or description of

[1] 21 J. I. c. 3.—[2] 5 & 6 Wm. IV. c. 83. 7 & 8 Vict. c. 69.—[3] Godson on Patents and Copyright, 170. Holroyd on Patents, 64. Webster on Patents, 65.—[4] Ibid.—[5] Godson, App. Holroyd, 64. 5 & 6 Wm. IV. c. 62, § 11.—[6] Godson, 172. B. C. i. 110.

the nature of the invention.[1] (*See below*, p. 86.) After some farther official procedure, which varies according to the division of the kingdom for which the patent is taken out, the great seal is appended under the sanction of the sign manual.[2] One patent will serve (if specially desired) for England and the colonies.[3] The patent states a time within which the "Specification" must be lodged. The English authorities state two months as the period when the patent is for England only, four months if it be for England and Scotland, and six months if it be for the United Kingdom.[4] The expense of obtaining a patent for Scotland is estimated at £100, for England at £120, and for Ireland at £125, or upwards.[5]

SECT. 2.—*Caveat.*

If any one is in the course of making a useful discovery, but has not completed it so far as to be able to lodge a full specification of its nature, while he at the same time fears that his discovery may find its way to others, or be anticipated before he is ready to apply for a patent, he may lodge a '*Caveat*' with the law-officers of the crown. This document is simply a request that notice may be given to the person who enters it, if any application should be made for a patent on the subject of an invention which he describes in general terms.[6] The use of a caveat is chiefly to be found in those cases where the inventor perceives his discovery in theory, but before he is prepared to take out a patent, wishes to have it reduced to experiment, and cannot do so without employing workmen, by whom the secret may be communicated.[7] It has to be observed that the lodger of the caveat acquires no monopoly or exclusive right against the *public* by his caveat. He cannot prevent any person from making and vending the object of it. Its sole effect is against any other person's right to obtain a *patent* for the invention. If any person therefore makes and vends the commodity in the mean time, the caveat becomes useless, for neither the inventor nor any other person can obtain a patent.[8]

When a caveat has been lodged, if any person applies for a patent relating to the same subject, the lodger receives notice, and has seven days for deciding whether he shall oppose the application. If he oppose, both parties are heard by the law-officer of the crown. If the inventions are differ-

[1] Godson, App.—[2] Ibid. 177.—[3] Ibid. 170.—[4] Carpmael on Patents, 62.—[5] Report of Select Committee on Patents, 12th June 1829, p. 17.—[6] Godson, 180. Webster, 69.—[7] Carpmael, 32. Webster, 69.—[8] Ibid. 33.

ent, each may obtain a patent. If both have made the same invention, neither can obtain one.[1] If the one has borrowed from the other, however, the original inventor will undoubtedly be entitled to the patent.[2] The parties are heard separately, so that the pleading of the one may not be the means of communicating information to the other.[3] It sometimes happens that a preference is thus competed for by several parties. A caveat expires in a year, but may be renewed.[4]

SECT. 3.—*Prolongation of Patent.*

The prolongation of a patent for seven years, after the expiry of the original fourteen, may be granted in terms of late acts. The applicant publishes his intention to apply for the prolongation to her majesty in council, by advertisement thrice in the London Gazette, in three London papers, and thrice in some country paper in the town or county where his manufacture is carried on, or (if he carry on none) where he resides. He then petitions the Council. Any person may lodge a Caveat against the prolongation, and the Judicial Committee of the Council, hearing all parties who so appear, and examining witnesses, report whether it should be granted or not. It was originally provided that these proceedings must be followed out before the original period of fourteen years expired;[5] but by a later statute the prolongation may be granted though the proceedings have not been completed, if the delay be not occasioned by the neglect or default of the petitioner.[6]

By a later act arrangements are made for still farther extending the duration of patents. The holder of a patent, whether the original patentee or an assignee, may present a petition to the queen in council, setting forth that the cost and labour of the invention will not be compensated by the original period of the patent, or the seven years' extension under the act of William IV., and praying for an extension beyond seven years. The application is reported on by the Judicial committee of the privy council, who may adopt such a period of extension, not exceeding on the whole fourteen years, as they may consider just.[7]

---

[1] Carpmael, 32.—[2] Godson, 145.—[3] Carpmael, 32.—[4] Godson, 181.—[5] 5 & 6 Wm. IV. c. 83, § 4. Webster, 96.—[6] 2 & 3 Vict. c. 67.—[7] 7 & 8 Vict. c. 69, §§ 2, 3, 4.

SECT. 4.—*Amendment of a Patent.*

A person who holds a patent, whether the original patentee or an assignee, may enter an Amendment with the clerk of the patents of England, Scotland, or Ireland, with consent of one of the law-officers of the crown of these countries respectively. The amendment may extend to "a Disclaimer of any part of either the Title of the invention or the Specification, stating the reason for such Disclaimer;" or "a Memorandum of any Alteration in the said Title or Specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent." Such Amendment is considered a part of the Specification. A Caveat may be lodged, giving the party a right to be heard against the Amendment before the Lord Advocate or other law-officer. The law-officer may require an advertisement to be made before he grants his consent to the amendment. No amendment can be pleaded in any action pending at the time when it is enrolled.[1]

SECT. 5.—*The Invention.*

It is a requisite of any invention for which a patent may be obtained, that it be complete of its kind, constituting when embodied a vendible article.[2] It is held that the discovery of a mere principle cannot be protected,—a practical result in the form of an article of commerce, or a step towards the production of some known commodity, must be shown; and so, if one make a discovery in mechanics or chemistry, from which he expects great practical results to be attainable, while in the mean time he is unable to produce any, he cannot obtain a patent.[3] It is no objection to the patent, however, that it is essentially for some principle in chemistry or natural philosophy, if it combine with the principle some special purpose and practical result.[4] The *invention* must have been made by the claimant of the patent, and not suggested by another person.[5] It must not have been used before, either by the petitioner or any other person.[6] By "using" appears to be meant the employment for some article of trade.[7] There are few cases in which one can avoid, in the literal sense, "using" an invention before it can be

[1] 5 & 6 Wm. IV. c. 83, § 1. 7 & 8 Vict. c. 69, §§ 5, 6.—[2] Holroyd, 33, *et seq.*—[3] Ibid. 55.—[4] Neilson *v.* Baird, 16th Nov. 1843.—[5] Holroyd, 59. Godson, 38.—[6] Holroyd, 18.—[7] Godson, 40.

pronounced successful. So, in the case of the refracting glasses, Dolland, who obtained a patent, was entitled to retain it, though Dr Hall had invented the same commodity, as the latter had not "used it" by communicating the commodity to the public;[1] the result would have been different had he used it as a vendible commodity, though he had concealed the method of construction.[2] In one of the trials on the hot-blast case, it was laid down, "that the evidence must be sufficient to show that the actual invention, as disclosed and set forth in the specification, was not only discovered, but put to public use; that is, was publicly used and practised at a period prior to the date of the patent, and that no experiments, however nearly they may have approached to the discovery of the invention in the patent, can avail, unless that discovery had been perfected and actually applied to public use."[3] It was held, in another of these cases, that to invalidate a patent, prior use must not only have been public, but must have been continued down to the time when the patent was obtained.[4] It follows, that if several persons are in common aware of the same invention, no one of them can obtain a patent; but that, if several persons simultaneously make the same invention without communicating it to each other, or using it, he who first applies is entitled to a patent, to the exclusion of the others.[5] It is sufficient to invalidate a patent for Scotland that the invention has been used in England.[6]

Confirmation.—The law on this subject is to a certain extent modified by statute. If it be found by verdict of a jury that a patentee is not the first inventor of part or the whole of the subject of his patent, some other person having previously invented or used it, or if the patentee himself discover this to be the case, he may petition the Queen in Council to confirm his patent, or grant a new one. The Petition and Objections are heard before the Judicial Committee, who, if they are satisfied that the patentee believed himself to be the first inventor, and that the invention had not been publicly used before the date of his patent, may recommend that the petition be acceded to.[7] When a patent comes under judicial discussion, and the decision is in favour of the patentee, the judge can give a certificate of the fact, the effect of which is,

---

[1] Buller J. in Boulton *v.* Bull, 2 Hen. Bla. 487. See Lewis *v.* Marling, 10 Barn. & Cres. 22.—[2] Case of Tennant, Davies' Patent Cases, 429.—[3] Neilson *v.* Baird, 16th Nov. 1843.—[4] Neilson *v.* Household Coal Company, 7th April 1842.—[5] Holroyd, 18. Godson, 40.—[6] Brown *v.* Annandale, 8th July 1841; affirmed, 1 Bell, App. 70.—[7] 5 & 6 Wm. IV. c. 83, § 2.

that if the validity be again questioned, the certificate may be produced, and if the decision be in favour of the patentee, he is to receive treble costs, unless the judge specially certify that he should not.[1]

Importation.—It is specially provided in the English statute of James I., and would probably be held law in Scotland, that a patent may be obtained by the first user of a foreign invention. The above principles apply to such a case, and so a patent for a foreign machine was protected, though a model of the machine had been previously sent to England, the model not having been used.[2]

Utility.—The invention must be useful and beneficial;—it would appear at first sight that there is little danger of a patent being disputed, unless the invention proves its utility by its vendibility, but a patent being held for a useless invention may be the means of preventing another person from applying that invention to some useful purpose.[3] The invention must be completely new as to all material parts. It does not follow, however, that it must form a new article or commodity not previously known;—it may be a new arrangement of things already known, or simply an addition to, or an improvement of, something already in use.[4] "An improvement on any known machine, whereby such machine is rendered capable of performing more beneficially," is a fit subject for a patent;[5] and so is any skilful arrangement of common materials, so as to make them productive of some beneficial effect not previously occasioned by them, as in the case of Mr Hartley's method of arranging iron plates in buildings as a protection from fire.[6] In such cases, however, the patent must be taken out only for the addition or improvement.[7] In the nice case of Russell, it appeared that the conversion of flat iron into pipes for gas had been accomplished by letting the iron at a welding heat pass through the circular aperture made by the junction of two concave semicircular grooves on the surface of two cylinders, at right angles to their axles. A plan was adopted of welding by passing the hot iron through a die by the traction of a draw-bench. It was superior to the other method, and was found to be a sufficient invention to justify a patent.[8] In the hot-blast case, on the other hand, the *result* produced was looked to; that result not however being a finished commodity, but only a

[1] 5 & 6 Wm. IV. c. 83, § 3.—[2] Lewis *v.* Marling, 10 Barn. & Cres. 22.—[3] Godson, 52. Webster, 10.—[4] Holroyd, 33-35. Russell *v.* Crichton, 7th June 1839.—[5] Carpmael on Patents, 16.—[6] Holroyd, 48.—[7] Ibid. 98.—[8] Russell *v.* Crichton, 8th June 1839.

change in the elements employed in its structure tending to economize the manufacture. It was left to the jury to say whether the patentee had so described his process as to be unable to maintain that his patent applied to all varieties of the method of producing the effect; but it was held, that if he had not limited himself to any particular description of apparatus, it did not affect his patent that the same effect might be produced by other means, the object protected by the patent being the heating of the air of a furnace at a particular stage of the process of the manufacture of iron, viz. in its passage between the blowing apparatus and the furnace.[1] It would appear that no person can obtain a patent for a mere improvement on a commodity for the making of which another person is in possession of a patent,—at least to the prejudice of the patentee; and it is held "that where an improvement to a patent is made after the enrolment of the specification, it becomes the property of the patentee, provided that the improvement cannot be used of itself, but, to be useful, must be superadded to the patented invention."[2]

Though the applicant must be the sole inventor, it is not necessary that he must have gone through the process connected with the first construction with his own hands. "The rule of law respecting the assistance from servants may be thus stated. If the servant make a new discovery by himself, such invention becomes his property; but if the master plans and the servant only executes with alterations of his own, then the master is the true inventor of the machine."[3]

A patent may be taken out for a combination of previously known machines or commodities, if the invention of the new combination be all that is claimed, or for an addition to any existing combination, if no more than the addition be taken credit for.[4] "The application of a known substance or material to a new purpose, when there requires art to adapt it, is the subject of a patent."[5] This is well illustrated by the case of the patent for percussion-locks. The detonating powder used for the purpose was well known before, but the patentee having first applied it as a priming for firearms, and used a lock adapted to the purpose, the application of locks of a different construction was held to be an infringement. It is observed that the use of the lock by the patentee, in this case, was necessary to convert his discovery into a vend-

[1] Neilson *v.* Househill Coal Company, 7th April and 15th Nov. 1842.—[2] Carpmael, 53, 54.—[3] Godson, 28. See Holroyd, 61.—[4] Bovill *v.* Moore, 1816, 2 Marsh. 211. Lewis *v.* Davis, 1829, 3 Car. & Pay. 502.—[5] Carpmael, 18.

ible commodity, and that he could not have supported a patent for the mere "application of certain well-known explosive mixtures as priming for firearms, without going into a detailed account of how that was to be done."[1]

SECT. 6.—*The Title.*

The title under which the patent is petitioned for is an object of great importance, as it is by the applicability of the title to the thing said to be invented that the lodger of a caveat knows whether the application will interfere with himself or not.[2] It must convey an idea of what has been invented, but of nothing more. Thus, Lord Cochrane's patent for naphtha-lamps was found void, because it was called "a method or methods of more completely lighting cities, towns, and villages," whereas, though it was only for such a purpose that his invention could apparently be used, from the offensive nature of the materials, the invention was after all but a lamp suitable for the purpose of burning naphtha, and should, it was said, be called so.[3] When Mr Wheeler invented a method of colouring porter by a small quantity of deep-coloured malt mixed with pale malt, instead of the old practice of preparing the whole malt of a certain depth of colour, and called the invention "a new and improved method of drying and preparing malt," it was said that there was no new method of drying and preparing malt in the invention, but merely a new way of colouring porter, and that it should have been called "a new method of preparing malt for the purpose of colouring beer or porter."[4]

The title must not contain more uses for the commodity than those which it is adapted to; so Felton's patent in 1827 for "a machine for an expeditious and correct mode of giving a fine edge to knives, razors, scissors, and other cutting instruments," was held bad, because the machine described would not sharpen scissors.[5]

SECT. 7.—*The Specification.*

The preparation of the Specification, which, as already mentioned, the patentee must enrol, is of the most material consequence. "The invention must be accurately ascer-

[1] Carpmael, 20.—[2] Ibid. 40.—[3] Cochrane *v.* Smethurst, 1 Stark, 205. Carpmael, 42.—[4] The King *v.* Wheeler, 1819—C. J. Abbot, 2 Barn. & Ald. 345.—[5] Holroyd, 94.

tained and particularly described: it must be set forth in the most minute detail. The disclosure of the secret is considered as the *price* which the patentee pays for this limited monopoly, and therefore it ought to be full and correct, in order that the subject of his patent may at its expiration be well known, and that the public may reap from it the same advantages as have accrued to him."[1] It will be seen below, that a late statute has somewhat reduced the risks arising from a mistake in the specification.

Of the features which should characterize the specification it is almost impossible to give a satisfactory abstract. One author on this subject says, "It is a *fundamental rule*, on which all others for making and judging of a specification depend, that the secret must be disclosed, and the invention described in such a manner that men of *common understanding*, with a *moderate knowledge* of the art, may be enabled to make the subject of the patent.

"The description must be *confined* to the manufacture, that the novelty may be known. Extraneous matter, however learned, must not be introduced to darken it. Though it is addressed to the public in general, it need not be so circumstantial, or so explanatory, that persons entirely ignorant of the science from which the subject is taken may thereby alone be able to learn and use the invention. Nor, on the other hand, should the description be so concise as to become obscure."[2]

The description must be so worded that the reader can clearly perceive the exact extent of the discovery made by the patentee, without confounding it with such elements in its construction as are not new discoveries.[3] If things are described as being used to produce the effect which really have not been used, they are presumed to be stated for the purpose of misleading, and will have the effect of destroying the patent.[4] Such also is the effect of any attempt to conceal the use of known materials by an obscure method of describing them, or by a technical description of the method in which they are formed, such as to make that appear part of the invention.[5] In the case of the Seidlitz powders, the patent for which was on such grounds reduced, Chief Justice Abbott said, "If a person on reading the specification would be led to suppose a laborious process necessary to the production of any one of the ingredients, when, in fact, he

---

[1] Godson, 107.—[2] Ibid. 118. See Holroyd, 100.—[3] Godson, 128.—[4] Ibid. 133.—[5] Holroyd, 108.

might go to a chemist's shop and buy the same thing as a separate simple part of the compound, the public are misled."[1]

Plans may be introduced. It does not appear to be necessary that they should be so in any case, but it is for the discretion of the applicant to insert them, if by doing so he can make the specification more intelligible. He will do so at the risk of his patent being void, if the plans are inapplicable or deceptive; but, on the other hand, if between the description and the plans the specification is made intelligible, he has the advantage of whatever aid to clearness is derived from the plans.[2]

Improvements.—Where an improvement merely has been invented, care must be taken not to make the terms of the specification such that a reader may be led to infer that a part of the commodity, well known before, has been invented by the patentee. Many valuable patents have been rendered void by such discrepancies.[3] The following are suggested as modes of specification in the case of improvements:

"*First*, By describing the whole manufacture, and then particularizing, with great exactness, the addition of the inventor.

"*Secondly*, By a description of the whole manufacture, pointing out the parts that either are old, or not material to the invention.

"*Thirdly*, By giving an accurate and intelligent description of the improvement, and the manner in which it is applied to the subject, or parts that are old.

"*Fourthly*, By describing the whole manufacture, if it be an improvement of another for which a patent has been obtained, taking care to refer in the new specification to that of the former patent."[4]

SECT. 8.—*Extent of the Privilege.*

The description of the invention in the patent is in the patentee's own words, and at his own risk.[5] It is an absolute condition in every patent, that he shall not, by Assignment or otherwise, extend the privilege to any number of persons exceeding five, or open any books for public subscriptions to raise money for carrying on the operation

---

[1] Savory *v.* Price, 1823, 1 R. & M. 1.—[2] Bloxam *v.* Elsee, 1825, 1 Car. & Pay. 558.—[3] Holroyd, 88, *et seq.*—[4] Godson, 156-7.—[5] Holroyd, 77.

from persons exceeding that number, and that he shall not presume to act as a corporate body.[1] On the subject of these limitations, Mr Carpmael says, "The words of this clause are so special, that if taken to the letter [they] might almost be deemed capable of rendering any patent void where more than five persons are interested, either directly or indirectly; yet it has generally been considered that permissive licenses to use or sell an invention to any extent may be granted by a patentee, provided that the consideration for such license is a sum certain, either received on the whole at the time of granting the license, or in the form of a sum paid annually during the continuance of the grant. But most lawyers have considered that a permissive license to use an invention, the patentee receiving part of the profits, would be a division of the letters-patent, and [that] if such licensees, including the patentee, exceed the number of five, the patent would be void. There is another description of license which is very commonly granted by patentees, and that is a license of an exclusive character to certain persons in trade to make or use the invention. On this subject the author has taken a great variety of opinions, which coincide with his own, that a license which grants to any number of individuals the right of using or making an invention, such license setting forth that the patentee will not license others within a given district, or that the patentee will only grant licenses to a certain number, or that the patentee, after licensing a certain number, covenants not to license any other person at other than a much higher consideration than that which has been given by the first licensees,—should the number of such licensees, including the patentee and any partner or partners he may have, exceed the number of *five*, it is considered that such granting of licenses would give a direct interest in the letters-patent to each of such individuals, and the same would thereby be rendered void."[2]

The patentee can convey his privilege in full, with his right of action, or he may communicate it by License, or convey a share in it, subject to the limitations noticed above. It is available to creditors on bankruptcy. The right is held to be heritable, and so attachable only by Adjudication.[3] The remedies for infringement of patent are noticed under the head of Remedies for Civil Injuries.

---

[1] Godson, App. Holroyd, 74. Carpmael, 75.—[2] Carpmael, 76, 77. See Holroyd, 145.—[3] B. C. I. 115. See above, Part II. Chap. 1.

PART III.

SUCCESSION.

CHAPTER I.

Succession to Heritage.*

Sect. 1.—*Legal Succession.*

Male Descendants.—The male children are first in the order of succession. The eldest son succeeds in preference to others. If the person who would have been the nearest heir is dead, he will be "represented," as it is termed, by the person who is *his* nearest heir. Thus, where one has died leaving a second son, surviving his eldest who has left children, the eldest grandson will succeed. But, if the eldest son dies without issue, the succession goes to the eldest surviving son, and so on.[1]

Females.—If there are no sons, or their descendants, the next heirs are the daughters. These do not succeed according to Primogeniture, or priority of age, but as Heirs-portioners, the estate being divided equally among them. If any one of the daughters has died leaving issue, she will be represented by heirs, who will succeed to her portion, the eldest son first, &c. according to the ordinary rule. If there is a mansion-house attached to the estate, the eldest Heir-portioner succeeds to it, and receives as her share the portion of the land in which it is situated.[2] The eldest has the custody of the title-deeds of the estate. She succeeds to any title in the family which may be held by a female.[3] The eldest is not entitled to the heirship moveables.[4] (*See* above, p. 46.) Where a Patronage is attached to the succession, each portioner exercises the right of Presentation in her turn.[5]

Collaterals—Conquest.—If there are no descendants the

---

* For the distinction between heritable and moveable, see above, p. 45.
—[1] E. iii. 8, 7, 12. Sandford on Heritable Succession, i. 1, *et seq.*—[2] E. iii. 8, 13. S. H. S. i. 9.—[3] S. H. S. i. 12, 16.—[4] Ibid. 17.—[5] Ibid.

succession falls on the Collaterals, or the brothers and sisters and their representatives. In the succession of one brother to another a distinction occurs between what is termed in this case Heritage and what is termed Conquest. The former is what one has succeeded to from an ancestor, whether in the natural course of law or under the limitations of a destination. The latter is what one has got otherwise than through his ancestors, as by purchase, gift, &c. The term conquest cannot apply to *all* the kinds of right which are included under the broad definition of heritable rights (*see above*, p. 45), it includes only all heritable rights connected with land, except leases and teinds. It may technically be said to include all rights in which Infeftment may be taken, (*see above*, p. 56), Teinds excepted.[1] If the person to be succeeded to was the eldest brother, his property, whether Heritage or Conquest, goes to the eldest remaining brother, who may be represented by his offspring as in the case of sons. If the deceased has left both an older and a younger brother than himself, his Heritage goes to the immediate younger brother, while his Conquest goes to the immediate elder. If the deceased was the youngest brother, the heir of conquest and of heritage are united in one person, the immediate elder brother.[2] It will prevent confusion to state, that the same rule takes place in the succession of uncles, to be shortly noticed; the uncles standing in the same situation as if they succeeded to the father of their nephew.[3] That which was conquest, on having been once succeeded to in that capacity, becomes heritage;[4] so, if an immediate elder brother succeeds as heir of conquest, on his death the immediate younger brother, if he have no children, will succeed. Failing brothers by the full blood and their descendants, sisters by the full blood succeed as heirs-portioners in the same manner as daughters. With sisters there can be no question as to whether the property is heritage or conquest.[5] Failing collaterals of the full blood, brothers or sisters Consanguinean—that is, by the same father—succeed, according to the same rules as those by the whole blood. Thus, if the only child of his father's first marriage has left heritable property, it will go to the eldest brother by the second, and if there is no brother by the second, to the sisters by the second.[6] Brothers and sisters uterine, or of the half-blood by the mother's side, do not succeed to each other.[7]

---

[1] E. iii. 8, 15, 16. S. H. S. i. 34, *et seq.*—[2] E. iii. 8, 14. S. H. S. i. 31.—[3] Ibid.—[4] E. iii. 8, 15.—[5] S. H. S. i. 4.—[6] Ibid.—[7] E. iii. 8, 8.

Ascendants.—If the deceased has left neither descendants nor collateral relations, the succession falls to the Ascendants, but only to those on the father's side, for the mother never can by the law of Scotland succeed to the heritable estate of her child; whence arises the principle that brothers and sisters uterine do not succeed to each other. The first in the order of ascendants is the father. Failing him the uncles and aunts, and their issue by representation, succeed, in the same order as if they were succeeding to their brother, the father of the deceased.[1]

Last Heirs.—If no legitimate relations of the deceased can be found, the crown succeeds to the property as *ultimus hæres* or last heir. If the property is held of a subject superior, and not a freehold, as it is said that the monarch cannot be vassal to his subject the superior of the lands, it has been the invariable practice to gift it to a subject, who is from this circumstance termed *the Donatory*. If the land holds immediately of the crown such a gift may also be made, but it is not in that case a matter of routine.[2] If a bastard have no legitimate children, no other relations can succeed to him, and the crown succeeds as last heir, generally making a gift of the property to the relation who would have succeeded had the deceased been a legitimate child. The reason assigned for this rule is, that a bastard's father is not, in the eye of the law, presumed to be known, and the mother and her relations never succeed to the heritable property of her son.[3]

Heirship Moveables, as above defined (p. 46), fall to the heir-at-law; and though the whole landed estate should be left to a different person from the heir-at-law, they will not fall to that person unless specially destined to him.[4] Where heirs-portioners succeed, the eldest is not entitled to the whole of the heirship moveables; each succeeds to a proportional share.[5] The simple appropriation of heirship moveables is a sufficient title to them without Service.[6] (*See below, Sect.* 6.)

SECT. 2.—*Collation.*

Collation is a practice derived from the spirit of the feudal law, by which, in certain cases, the heir succeeding to the Heritage is entitled to throw it into one mass with the Move-

---

[1] S. H. S. i. 6.—[2] E. iii. 10, 2, 3.—[3] Ibid. 5, 6.—[4] E. iii. 8, 17.—[5] Cruickshanks *v.* Cruickshanks, 27th May 1801, M. Heir-Port. Ap. No. 2.—[6] S. H. S. i. 42.

ables, and take an equal share from the whole, along with the Executors, or those who succeed to the moveables. The heir who can do so must be one of the persons who would have succeeded to a share of the moveable property, if there had been no heritage, viz. one of the next of kin to the deceased.[1] (*See below, Chap.* II. *Sect.* 1.) So where one succeeds to his grandfather's heritage by representing his father, he cannot call on his uncles, who succeed to the moveables as nearest of kin, to collate with him. If one of the next of kin succeeds to heritable property, not in the ordinary course of law, but in terms of a deed of succession, he is entitled to claim his share of the moveables. If the property is such as he would not have succeeded to without the deed of destination, he can claim his share of the moveables without collating; but if he would have succeeded to the property independently of the deed of destination, then he cannot have a share of the moveables without collating.[2] On the same principle it has been held that the heir in heritage, if he claim a share of the moveables, must collate heritage disponed to him by his father during his lifetime.[3] An heir succeeding to landed property in another country, if, by the deceased being domiciled in Scotland, the Scottish rule of succession as to moveables is to prevail (*See Chap.* II.), must collate in the same manner as if the heritable property had been in Scotland; but if the succession to the moveables is regulated by the law of another country which does not require collation, the heir may claim a share of the moveables without collating, though he succeed to landed property in Scotland.[4]

SECT. 3.—*Succession by Deed of Provision.*

It is of the very essence of a deed, providing for the destination of landed property, that it should be in the form of a disposal of the property to the person in whose favour it is made, to take place at the time of the granting of the deed, and that it should not bear that the property is to pass to him after the granter's death. It is a doctrine of the law of Scotland that heritable property cannot be disposed of by will or testament, but only by gift; a form of conveyance which has arisen out of the principle of the early feudal law, that the vassal had no power to fix the destination of his

[1] M'Caw agt. M'Caws, 28th November 1787, M. 2383.—[2] S. H. S. i. 46. Br. St. 599.—[3] S. H. S. i. 46.—[4] Ibid. 53. Br. St. 599.

estate after his death. An apparent exception to this rule, of very early date, however is, that, disponing his estate to any individual, he might fix the order of succession to the estate in the deed, and this exception has been extensively taken advantage of in Deeds of Settlement. There are three forms by which one may destine his heritable property to a successor. He may dispone or make over the subject to *himself*, destining it to pass on his death to the person whom he wishes as a successor; he may destine it directly to that person, reserving to himself the liferent; or he may make it over directly to him in the form of a gift, to take effect from the moment of signing the deed,—in which case a power to alter is generally expressly reserved.[1] If the maker of the deed do not intend to deliver it during his lifetime,* it is necessary that it should have a clause dispensing with delivery, to make it effectual when found in his repositories after his death.[2]

It is necessary that the terms made use of should be applicable to heritable property, and though they need not be minutely specific, they must be such as show that the granter does not mean to include merely his moveable property. So, where a person "assigned and disponed" every subject moveable and "immoveable, of whatever denomination," which belonged to him, the destination was held sufficiently explicit.[3] As the method of disposing of heritage in Scotland is regulated by the forms of Scotland, and not by those of the country in which the proprietor resides, a destination of Scottish heritage, even by a person living in a country by the laws of which heritage may be bequeathed by will, requires to be according to the Scottish form of destination. There is one method by which, through an obligation on his heir, one may dispose of heritage in terms of bequest. If one has left to the person who would have been heir to his heritage, moveable property to which he would not have succeeded, and by the same deed bequeaths heritable property to another person, the heir, if he take advantage of the deed by succeeding to the moveables, cannot impugn the bequest of heritage.[4]

Technical Terms.—There are certain technical expressions which, when employed in the destination of landed property, must receive their usual acceptation, and cannot be explained away by any extraneous evidence to prove that the granter

---

[1] B. P. 1692.—* See Part IV. Chap. II. Sect. 8.—[2] E. iii. 2, 44.—[3] Welsh *v.* Cairnie, 28th June 1809.—[4] S. H. S. i. 77.

intended a different person from the individual so designated to succeed. The following expressions, "Heirs," "Heirs-at-law," "Heirs-General," "Heirs Whomsoever or Whatsoever," and "Heirs of Line," of any individual, are synonymous, and point out the persons who would succeed in the regular course of law, to landed property left by that individual undestined. The term "Heirs-Male" applies to males connected through males. The term "Heirs-Female" applies to that female and her heirs (whether male or female) who is most nearly connected on feudal principles with the deceased. In this view, a granddaughter who is the daughter of a son (or her son if she is dead) is a nearer heir-female than a daughter. The term Heir-Male of line, applies to the heir-male, excluding the heir of conquest. Heir-Male of the body is the nearest heir-male in the direct line of descent.[1]

SECT. 4.—*Substitutions in Deeds of Provision.*

In Marriage-contracts and other deeds which provide for parties becoming connected with each other, and for such events as, the birth of children, survivorships, and the like, some care is requisite in using expressions which will give parties the exact rights intended to be destined to them.

Fee and Liferent.—Where heritage is destined to more than one person, the rights of the parties are generally either rights of Fee or rights of Liferent. A right of Fee is a full right to the property, without any other person having a claim upon it. A right of Liferent is a mere right to enjoy the subject during life, the Fee or absolute property of it being in another person.

It is often the wish of the maker of a destination that it should be left to circumstances to point out who shall be fiar, and who liferenter. In these cases the more ordinary destinations, and the interpretations given to them, are as follows:—In the case of strangers, where a right is destined *in conjunct fee to A and B*, they enjoy the subject in common while they live; on the death of either, his heir enjoys it in common with the survivor; and on the death of the survivor, the heirs of both enjoy it in common. Where a right is destined *to A and B, in conjunct fee and liferent, and their heirs*, the two enjoy the fee of the subject in common while both are alive; after the death of one, the survivor enjoys the liferent of the whole, and after the survivor's

[1] E. iii. 8, 48. S. H. S. i. 160-170.

death, the fee is divided equally between the heirs of both. If the right be destined *to A and B jointly, and the longest liver and their heirs*, the words *their heirs* are held to point out the heirs of the longest liver. If the right be taken *to A and B and the heirs of A*, A is the fiar or proprietor, and B is merely a liferenter.[1] So where the title was taken to A and B in conjunct fee and liferent, and to the survivor, and their heirs, it was found that the survivor has the fee, and may dispose of it.[2]

Husband and Wife.—In questions about destinations between husband and wife, there are limitations on these rules. Where property, which has not come from the wife, is destined to the husband and wife *in conjunct fee and liferent*, and *to the heirs of their body*, or *to their heirs*, the husband is the fiar, and his heirs succeed, the wife being merely liferenter. But if the property have come from the wife and her relations, she is fiar, and the husband liferenter, unless the subject have been given in name of Dower or Tocher, when it is considered as the property of the husband.[3] Where property is destined to the husband and wife *in conjunct fee and liferent, and to the heirs of the marriage, whom failing, to the heirs of the wife*, the wife is fiar.[4]

Property destined to one *in liferent*, and to his children *nascituri* (to be born) in fee, is the property of the father, which he can dispose of, and to which the children have only a hope of succession if it exists at his death, unless some restrictive term be used, such as "for his liferent use allenarly," or "alimentary," in which case the father is said to hold only a Fiduciary Fee for the benefit of his child. But if the property is destined to a father *in liferent*, and to a child though named and existing *in fee*, if a power to dispose of or to burden the property, or to alter the succession, is reserved to the father, he must of necessity be considered the fiar, even if the term *allenarly* is used.[5] Where the property is simply destined to the father *in liferent*, and to a child existing and named *in fee*, the fee is in the child, and the father has only the use of the property. The purpose of conveying property to children may be effected by conveying it to trustees for their behoof. If in such a case the destination be to one in liferent, and to his children unborn in fee, the trustees preserve a fiduciary fee for the children during the running of the liferent.[6] *

[1] E. iii. 8, 35. S. H. S. i. 208, *et seq.*—[2] Burrowes *v.* M'Farquhar's Trustees, 6th July 1842.—[3] S. H. S. i. 211.—[4] Ibid. 214.—[5] Ibid. 216, 228.—[6] S. H. S. i. 228, &c.—* See Part IX. Chap. I.

It may generally be said that when there is any contingency, on the occurrence of which the property devolves on another party, the holder cannot defeat it by a gratuitous settlement—so, when an heritable bond was conveyed to four nieces and their heirs and assignees, with a condition appointed to be engrossed in the infeftment, that on the death of any one of them before marriage, her share should accresce to the survivors, it was found that settlements made by two who died unmarried, could not defeat the right of succession of their sisters.[1] Where, however, an order of succession is so fixed that its alteration is placed beyond the power of any of the persons holding under it, and is protected from the effects of onerous transactions with third parties, the deed is popularly called an Entail, a species of destination reserved for separate consideration.

SECT. 5.—*Deeds granted on Deathbed.*

Deeds executed while the granter is of unsound mind, or deprived, by bad health or any other cause, of consciousness of what he is doing, may be rendered null at the instance of parties affected by them. (*See below*, p. 125.) The heir to heritable property holds the privilege of challenging all deeds granted to his prejudice while the granter is on deathbed, or, as it is technically termed, while he is not in "*liege poustie.*" The general rule is, that if the granter was suffering under the disease of which he died when he granted the conveyance, it may be reduced. The arbitrary limitations are as follows:—1st, If he survive the granting of the deed sixty days, it cannot be challenged.[2] The sixty days do not include, but run from, the day on which the deed is executed; but if the sixtieth day has begun, it is held as completed (*dies inceptus pro completo habetur*).[3] 2d, If the granter of the deed have gone freely, and without support, to kirk or to market after having granted the deed, it cannot be challenged.[4] By his going unsupported, it is meant that he should go in his ordinary manner, and so as to show to the public that he is in his usual health. It will not be ground for eliding the presumption of his being in his ordinary health, that he has gone on horseback, or in a carriage, unless it appear that these aids were employed in furtherance of a collusive project, for enabling one diseased, and

[1] Lawson *v.* Imrie, 10th June 1841.—[2] 1696, c. 4.—[3] Ogilvie *v.* Mercer, 10th December 1793, M. 3336.—[4] E. iii. 8, 96. A. S. 29th February 1692.

unfit for business, to go through the ceremony by assistance. So where one had gone to church on horseback, having been in the habit of going on foot, had received assistance both in mounting and dismounting, which he had never been accustomed to previously, had entered the church during service, and departed before it was done, and appeared there to be suffering under disease, the ceremony was considered as collusive.[1] According to the terms of an old act of sederunt, in which the court explained its views, they were not to sustain the ceremony "unless it be performed in the daytime, and when people are gathered together in the church or churchyard for any public meeting, civil or ecclesiastick, or when people are gathered together in the mercate place for public mercate."[2] Publicity seems here to have been aimed at as the necessary qualification. It is not however considered essential that the market should be visited on a statutory market-day. Walking through a city market-place, and doing business in the neighbouring shops, was held sufficient.[3] Where a person was set down from a coach in the Grassmarket of Edinburgh, and merely crossed it during a change of horses, the act was held sufficient.[4]

No other indications of health, however strong, will be admitted as equivalents. Paying visits, and attending a general county meeting, and a meeting of road-trustees, were held insufficient.[5] However quickly death may follow the executing of the deed, if it does not arise from a disorder of which the granter was then ill, his act cannot be challenged.[6] So where a supervening disease, of a different nature from that under which the granter laboured at the time of executing the deed, terminated his life, he was held not to have been on deathbed.[7] A deed was held liable to the objection of deathbed, which was executed by the granter in his ninetieth year, when he was confined to bed by infirmity, and died in fifteen days, though there seemed ground for holding that he died, not of disease, but of the decay of nature attending extreme old age.[8]

Who may challenge.—The person entitled to challenge is the heir to the heritable estate. Where the estate is unfettered by any previous destination, he will be the heir-at-law. (*See above*, p. 90.) Where there has been a destina-

[1] Faichney *v.* Faichney, 9th July 1776, M. Deathbed, Ap. 1.—[2] A. S. 29th February 1692.—[3] Rait *v.* Rait, 27th November 1818.—[4] S. H. S. i. 94.—[5] Maitland *v.* Maitland, 16th May 1815.—[6] E. iii. 8, 96.—[7] Paterson's Trustees *v.* Johnston, 24th June 1816, 1 Mur. 71.—[8] Tomison *v.* Tomison, 14th December 1839.

tion of heirs (by an entail, marriage-contract, &c.), the person so appointed will be entitled to challenge the death-bed deed, even if it should be in favour of one who would have otherwise been heir-at-law.[1] If the heir neglect or refuse to reduce, his creditors may use his right of challenge.[2] If the heir can neither benefit himself nor his creditors by the reduction, he is barred from urging it by want of interest.[3]

Homologation (*see* p. 127) by the immediate heir will bar reduction. It is decided that he does not homologate by an antecedent writing, promising to ratify a deed which may be executed on death-bed.[4] Signing as witness to the granter's subscription is not sufficient.[5] Where, in an old case, the heir had both written the deed and signed as witness, he was held to have approved; but it is doubted whether this is now law.[6] An heir cannot homologate while he is minor.[7] It is necessary that he should be fully acquainted with what he is giving up, and the court will protect him where he acts under the influence of fraud or concealment.[8] It would appear that before he can homologate, he must be aware of the law by which an heir is entitled to reduce a deathbed deed.[9] The heir cannot defeat the right of his creditors by homologation.[10]

The deeds which the heir is entitled to reduce are, in general terms, all that may be prejudicial to his interest.[11] Deeds directly alienating heritage are all distinctly within the rule; but in those cases in which the heir is indirectly affected, it is often difficult to draw a line of distinction between administration of the property and the intention of depriving the heir of part of it. If a legacy cannot be paid out of the moveable estate, and must therefore burden the heritable, the heir has an interest to reduce it; but if by the same deed he be left property, heritable or moveable, which he would not otherwise have succeeded to, he cannot take advantage of the deed, in so far as it is in his favour, and reduce it in so far as it is to his disadvantage.[12] A lease for an inadequate rent, or one of unusually long duration, granted on deathbed, may be reduced.[13] A tack for three nineteen years of the granter's whole estate was so reduced, though

[1] S. H. S. i. 149. Hepburn *v.* Hepburn, 25th February 1663, M. 3177. Porterfield *v.* Cant, 24th July 1672, M. 3179.—[2] S. H. S. i. 149.—[3] Ker *v.* Vaughan, 10th March 1830. App. 1st October 1831, 5 W. & S. 718.—[4] S. H. S. i. 153.—[5] Dallas *v.* Paul, 13th January 1704, M. 5677.—[6] Brown *v.* Muir, 17th June, 1736, M. 5624. S. H. S. i. 152.—[7] S. H. S. i. 154.—[8] Murray *v.* Murray, 21st January 1826.—[9] S. H. S. i. 153.—[10] B. P. 1816.—[11] E. ill. 8, 97.—[12] S. H. S. i. 141-148. Paterson *v.* Spreul, 19th July 1745, M. 3333.—[13] S. H. S. i. 138.

it was not alleged that the rent was inadequate.[1] A sale of heritable property for an inadequate sum may be reduced; and it is held that if the sale is *prejudicial* to the heir, he can reduce it.[2] If the money paid as a consideration in such a case has not been spent, it is refunded to the purchaser. If it has been spent onerously, as in debts or engagements which the proprietor was bound to fulfil, the heir must refund it, having recourse on the executor; but it is said that if the money have been gratuitously spent, the heir cannot be called on to refund it.[3] The discharge of an heritable debt is good on deathbed; but if it is fraudulent, it may be reduced.[4] Deeds which the granter has come under a previous obligation to grant, may be validly executed on deathbed.[5]

If the heir has taken possession of the property during the granter's lifetime, in virtue of a Disposition, with a clause reserving to the granter the power of altering it at any time, he is barred from objecting to any deed granted on deathbed, in consequence of the reserved power. But if there be such a deed of which he has not taken the benefit, no reservation in it can deprive him of his right of challenge.[6] If a deed is granted, not on deathbed, to one not the heir-at-law, and afterwards on deathbed, a different deed is granted to another person, still not the heir-at-law, the heir cannot reduce the second deed, having ceased to be heir since the first deed was granted. But if the first deed has been cancelled, his right to challenge a deed granted on deathbed revives. If the second deed revokes the previous deed, the right of the heir to challenge the second deed revives, and it is good in as far as respects the revocation, while it is reduced in all other respects.[7] If the deed granted on deathbed be part of a series of deeds constituting together one consistent settlement, no person taking benefit by the previous parts of the settlement can reduce the last, and if such a person be heir-at-law, he must renounce or forfeit his benefits under the earlier part of the series if he reduce the last.[8]

SECT. 6.—*Investment by Service.**

A person to whom land is directly conveyed by the proprietor is invested in the same manner as a purchaser. (*See*

[1] Christysons *v.* Kerr, December 1733, M. 3226.—[2] S. H. S. i. 99.—[3] Ibid. 100.—[4] St. iii. 4, 29. B. C. i. 94.—[5] B. C. i. 94. S. H. S. i. 135.—[6] Bank. iii. 4, 48. S. H. S. i. 111-115.—[7] S. H. S. i. 115-135. Anderson *v.* Fleming, 17th May 1833.—[8] Black *v* Watson, 9th February 1841.—

* A bill introduced during the last session of parliament "to alter and amend the law and practice in Scotland as to the service of heirs" has been postponed till next session.

pp. 55, 168.) It has been stated above, that destinations of land, though only to be effectual after death, must be made in the form of a conveyance from one living person to another. (*See Sect.* 3.) Hence, when a series of heirs is appointed, the one to succeed the other, the first person named, who is technically called the *Institute* or *Disponee*, is held to be in the position of a person to whom property has been conveyed or sold, and as such a person he makes up his titles. The others, who are called Substitutes, and who succeed in their order failing the first, are considered in the light of heirs; and to distinguish them from the Heirs-at-Law, they are called Heirs of Provision. Service is one of the forms by which an heir makes up his titles. It is the verdict of a jury as to the right of a person making certain claims, and it proceeds on a Brieve from Chancery, directed either to the Sheriff of the county or the Sheriff of Edinburgh if it be a Special Service, and to any sheriff or burgh magistrate if it be a General one.

Special service is employed where the person to whom the heir claims to be successor has been feudally invested in his property by Infeftment. The heir transmits to the jury a claim, specifying the character, whether as heir-at-law, or of provision, in which he claims. The brieve contains seven heads or questions, to be answered by the jury, the most essential of which are, whether the deceased was infeft, and was the last person infeft in the lands? and whether the claimant possesses the character in which he claims to be served? When a favourable verdict is returned, if the lands hold of the crown, a Precept is issued addressed to a Notary Public warranting him to infeft the heir. If the superior is a subject, an extract will be the means of compelling him to grant a precept. The heir, after having thus served himself, completes his feudal title to the land by taking infeftment. (*See above*, p. 55.) Until he has done so, he has not a right which he can transmit to his heirs; and if he die before completing the infeftment, the service is useless to his heir, who must expede a new service to the person last vest by infeftment in the property.[1] In a special service, it is sufficient that the heir shows himself to be possessed of the character which he claims; and it can be no objection that, even admitting him to be the heir, he cannot come to the possession of the property, because another person has

[1] E. iii. 8, 60-67. Jur. St. i. 374, *et seq.* S. H. S. i. 273, *et seq.* 8 & 9 Vict. c. 35, § 6.

got a legal right to it by a conveyance. But if any other person is infeft in the property, the objection is valid, because the jury cannot answer that the person, to whom the heir wishes to be served, died last infeft. In order to enable heirs to reduce such infeftments, when given to one who has not a proper title, a general service is had recourse to.

A general service proceeds on a Brieve similar to that of a Special Service, but the answers of the jury are only to the effect that the ancestor died at the king's peace, and that the claimant is his next and lawful heir. No person can appear as objector to a general service, but a person claiming a right of propinquity preferable to that of him who has obtained the brieve. In such a case a brieve is obtained by each party, and a competition takes place, in which the jury must decide according to the evidence. One who has obtained a right to the property by conveyance, cannot therefore oppose the service, though it proceed on defective evidence; but he may bring a reduction of it on such a ground. A general service is not an act by which the person served is put in possession of a right over any subject. It is a mere declaration of his propinquity; and, as such, enables him to enter into possession, first, of such rights requiring infeftment as the ancestor had not been infeft in; and, second, of such heritable property belonging to him as does not require infeftment; and by declaring him to be the heir, it places him in a situation to pursue a reduction of such deeds as interfere with his right.[1]

SECT. 7.—*Investment by Clare Constat, and by Trust-Bond.*

Clare Constat.—An heir whose ancestor has been infeft in property holding of a subject, may make up his title as heir without the ceremony of a service, by the consent of the superior. The deed by which the superior consents is termed a Precept of *Clare constat*, from the words of style with which it commences. It is an intimation by the superior of his belief that the person in whose favour it is granted is the heir of him who died last infeft in the lands, and a mandate to infeft the heir. Though considered applicable only to an heir-at-law, it has been admitted in the case of an heir of provision. A Precept of *clare constat* is not effectual, unless the superior is infeft in his superiority; but if he have granted one before being infeft, the heir's infeftment on it will be

[1] E. iii. 8, 66. Jur. St. i. 392, *et seq.* S. H. S. i. 287, *et seq.*

effectual, whenever the superior is infeft. A precept of *clare constat* does not prescribe till forty years, while a service prescribes in twenty; that is to say, while the former may be challenged at any time within forty years, the latter cannot be affected after twenty years have elapsed.[1]

Trust-Bond.—Another mode of entering was invented, for the purpose of enabling an heir to challenge deeds adverse to his right, without immediately rendering himself liable as heir; it is termed entry by *Adjudication on Trust-Bond.* The heir grants a bond to a confidential person, for a sum equal at least to the value of the estate. The holder of the bond adopts the means which the law has provided for enabling creditors of an heir to realize the succession, when the heir refuses to enter on it.* Having so adjudged the property, he brings a reduction of the adverse deed, and, if successful, conveys the bond and the Adjudication on it to the heir.[2]

SECT. 8.—*Investment in Burgage Tenements.*

In tenements held Burgage† there is a method of entering as heir, similar to that by precept of *clare constat*, termed by *hasp and staple.* A magistrate of the burgh, and the town-clerk, meet the claimant at the tenement. In all towns, except Edinburgh (where a different practice has existed), the magistrate cognosces or declares the claimant heir, on proof of his being so, by two or more witnesses. The heir then, as a symbolical ceremony, takes hold of the *hasp and staple* of the door, enters the house, and bolts the door. On coming out he takes instruments in the hands of the town-clerk, as a notary. By this process he is not only declared to be heir, but he is infeft, and the Instrument of Sasine is recorded in the burgh register. Where the ancestor has not been infeft in the property, the magistrates require the heir to expede a general service as above. Where the heir claims under the destination of a deed, he must be served as heir of provision.[3]

---

[1] E. iii. 8, 71. S. H. S. ii. 1, *et seq.* Durham *v.* Graham, 3d January 1798, M. 15118.—* See Index "Charge to enter heir."—[2] E. iii. 8, 72. S. H. S. ii. 9, *et seq.*—† See above, p. 58.—[3] E. iii. 8, 72. S. H. S. ii. 7, *et seq.*

CHAPTER II.

Succession to Moveables.

Sect. 1.—*Order of Succession.*

The moveable estate of the deceased is called the Executry, and those who succeed to it by will, or by the natural course of law, are collectively termed Executors. It will be observed that the portion of the moveable property, open to be disposed of by will, is affected by the existence of a widow or children. When not regulated by will, the order of succession is the same as in heritage (*see above*, p. 90), the Descendants according to their degrees succeeding in the first place, the Collaterals where there are no Descendants, and the Ascendants where there are neither Descendants nor Collaterals.[1] The whole-blood excludes the half-blood.[2] All the nearest of kin succeed equally, without any preference to males over females, or to elder over younger, so that where there are three children, the moveable estate will be equally divided among them, and where there are no children, but three brothers, a similar division will take place.

If one of the next of kin is heir to the heritage, he is excluded from any share in the moveable estate, unless he collate the heritage, or add it to the bulk of the moveable estate. If the heir to the heritage is the only person next of kin, he succeeds to both heritable and moveable estate. An only child will succeed to both. A family consisting entirely of daughters will have both divided equally among them. In the succession to moveables there is no Representation of persons deceased as in heritage, so that, if the deceased leave a son, and a grandchild by a deceased son, the surviving son will succeed to the exclusion of the grandchild.[3]

Domicile.—Succession to heritage situated in this country is regulated by the law of Scotland, wherever the death of the last proprietor may have taken place; but it has been the custom over the rest of the civilized world, and has of late become law in Scotland, to regulate succession in moveables by the law of the country in which the deceased had his domicile when he died.[4] Mere residence in a country at

[1] E. iii. 9, 2.—[2] Gemmil *v.* Gemmils, 5th July 1729, M. 14877.—[3] E. iii. 9, 2.—[4] Bruce *v.* Bruce, 25th June 1788, App. 15th April 1790, M. 4617. Robertson on Personal Succession, 118.

the time of death will not mark the domicile to the effect of regulating the succession; but it is difficult to say what concomitan circumstances are necessary. Where a man has died in a different country from that in which he was born and brought up, to change his domicile with his residence, it will in general be necessary to show that he has established himself as a citizen of the country of his new abode,—a circumstance which may be evinced by his adoption of a permanent residence, procuring a situation, entering on business, or forming connexions.[1]

SECT. 2.—*Distribution.*

It is to be observed that man and wife are considered as holding their mutual moveable property in communion. When either of them dies, therefore, a certain portion of the property goes to the spouse surviving. The practical effect of this rule, where there are no conventional stipulations, is as follows:—If a man dies leaving a widow and children, his moveables are divided into three parts, one goes to the widow, and is called *Jus relictæ*, another goes to the children, and is called *Legitim*, or *Bairns' part*, and the third is called the *Dead's part*. It is the share of the common property, which is presumed to be properly the husband's, and it is therefore employed to pay whatever legacies or bequests he may have left, and if not so exhausted, it goes to his children as next of kin. If the deceased leave a widow and no children, one-half goes to the widow, the other is dead's part. If he leave children and no widow, one-half goes to the children, the other is dead's part. If he leave neither widow nor children, the whole is dead's part, liable to payment of debts and legacies in the first place, and in so far as not exhausted by these, going to the nearest of kin.[2]

On the death of a wife leaving a husband who has no issue, one-half goes to the husband, the other to the wife's next of kin (who will be her children of a former marriage, if any), or to her legatees. If there are children of the marriage, or of the husband by a former marriage, the husband receives two-thirds, one of which is considered as the children's legitim. It is only subject, however, to their claim of legitim after their father's death; and it is estimated, not according to the amount of the common property at the time of the wife's death, but as a half of what belonged to the father

[1] Hog v. Hog, 7th June 1791, M. 4619. See the English Case of Somerville v. Somerville, 5 Vesey, 750. Robertson, 168.—[2] E. iii. 9, 17, 18, 19. Robertson, 367, *et seq.*

at *his* death. The remaining third being dead's part, goes according to the wife's bequest, or to her children, or other next of kin.[1]

Renunciations and Exclusions.—This distribution may be altered by the resignation or presumed resignation of the rights of any of the parties. The wife may renounce her *jus relictæ*, either by agreement or by implication; as where a widow had down to the period of her death (being twelve years after that of her husband) taken payment of an annuity settled on her by her husband, without making any claim for her *jus relictæ*.[2] A son who is heir-at-law to the heritable estate, and who succeeds to it, whether by representation or provision, has no share in the moveables unless he collate.[3] The legitim of a child may be excluded by his renunciation, or by a reasonable provision having been made for him in a contract of marriage, which excludes the right to legitim. It has to be observed that the legitim is not excluded in the general case by a contract made after the marriage of the parents, unless the child have acceded to it.[4] Advances made from the moveable estate to the child for establishing him in trade, for a marriage-portion, &c., will be imputed to his legitim, and if he claim a share after death, he must *collate*, or add what he has so obtained to the whole legitim, taking his share of the mass.[5] In other words, it is presumed that his legitim, or a portion of it, has been advanced to him, unless it be clear from the terms of the grant that it was intended to be given in addition to his share of the legitim.[6] A child claiming legitim must renounce any advantages he may have under a general settlement.[7] And it was held that a husband, by concurring in his wife's claim of legitim, is held to have barred himself from claiming property left to himself, in the settlement of his wife's father.[8] A married woman may choose to take a provision in her parent's settlement, instead of legitim, though the choice be against the interest of her husband's creditors.[9]

Legitim vests in a child by simple survivance, though its amount should not have been ascertained. It is not due to

---

[1] E. iii. 9, 21. Fraser, i. 532. Lashley *v.* Hog, App. 16th July 1804, Robertson, 145.—[2] Milne *v.* Innes, 5th December 1822.—[3] Murray *v.* Murray, M. 2374. Stewart *v.* M'Naughten, 2d December 1824.—[4] E. iii. 9, 23. Fraser, i. 561. Cullen *v.* Cullen, 16th November 1838. Howden *v.* Howden, 20th January 1841.—[5] E. iii. 9, 24.—[6] Ibid. 25.—[7] Fraser, i. 563. Henderson *v.* Henderson, M. 8191. Menzies *v.* Livingstone, 27th February 1839. Breadalbane's Trustees *v.* Buckingham, 5th March 1840.—[8] Buckingham *v.* Lauderdale, 15th December 1843.—[9] Stevenson *v.* Hamilton, 7th December 1838.

grandchildren, but only to the immediate children; who, by receiving it, are not deprived of their share of the dead's part (if it be unbequeathed), as nearest of kin.[1] The *jus relictæ* and legitim cannot be defeated by a testament. The husband and father, however, having the complete disposal of the goods in communion, a gift or sale of the property during his lifetime cannot be questioned. He cannot, however, by a collusive deed professing to be a definite transference at the time, but virtually only an arrangement to take place after death, disappoint his widow and children. So, where the father retains possession of the property professed to be transferred, or the deed is revocable, or contains any interest which his creditors might attach, it is ineffective.[2] This right of disposal he loses on deathbed, fraudulent intention or undue influence being then presumed as the cause of any disposal of his property to the prejudice of the widow or children.[3] (*See* p. 97.)

In the general case of a fund being accepted of in place of legitim, by one child, what remains of the legitim will go to the others; but where there was a settlement of all a father's estate in favour of a general disponee, burdened with provisions to the children, and one child agreed to accept of his provision in lieu of legitim, but another did not, it was found that the share which fell to the latter was not increased by the other's renunciation, but that the difference went in favour of the general disponee.[4] In a continuation of the case, it was found, that where a child who would be entitled to legitim is made general disponee, another child repudiating a special provision, and betaking himself to his legitim, the fund from which he draws it is reduced by the amount of legitim which would appertain to the brother the general disponee.[5]

That part of the goods in communion, then, already described as *Dead's part*, is the only portion which descends to the nearest of kin as executors, when there is no will, and is the only part which can be conveyed by a testament or will.

SECT. 3.—*Wills or Testaments.*

A will or testament requires to be in no particular form; it is sufficient that it clearly express the intention of the

[1] E. iii. 9, 19.—[2] E. iii. 9, 16. Bankt. iii. 8, 26.—[3] E. iii. 9, 16. Fraser, i. 547, 552.—[4] Fisher *v.* Dixon, 16th June 1840, affirmed 6th April 1843, ii. B. App. 63, and see Pringle *v.* Breadalbane's Trustees, 15th January 1841. —[5] Dixon *v.* Dixon, 6th July 1841.

maker. It may be made at any period of life after pupillarity, and is not, like a destination of landed property, reducible if done on deathbed. It must be a written deed, but a Nuncupative will, or verbal direction, proved by witnesses, is valid to the amount of a hundred pounds scots (£8, 6s. 8d.), and should the verbal will exceed that sum, the person in whose favour it is uttered will have a claim to that amount.[1] All who are capable of consent may make a testament. Minors without the consent of their curators, wives without the consent of their husbands, and persons interdicted without the consent of their interdictors. (*See* pp. 25, 39, 44.)[2] Until a late period, a bastard could not make a testament, but that law has been repealed.[3]

The grounds for reducing a will are insanity or idiocy; such imbecility, permanent or temporary, as may render one incapable of understanding what he is about; and fraud. That the testator's hand was directed as he signed, that the letters of his name were traced with a pen, and probably that a written copy was placed before him for imitation, would be objections.[4]* It is no ground of reduction that the will is signed by a blind man.[5] A will requires the attestation of two witnesses, according to the form pointed out under the subject of deeds.† If the testator cannot write, he may execute the deed notarially, in the manner pointed out under the same head, observing that one notary with two witnesses are sufficient, and that a parish clergyman may act as notary.[6] A will which is Holograph or written by the granter is valid without witnesses, but in such a state it will not prove its date, and will be presumed to have been made at the period most unfavourable to the person whom it favours in competition with other claimants; so, if a tested will be found, the Holograph one will be presumed the earlier in date of the two, and revoked by the other, but such a presumption may be defeated by circumstances.[7] Where the intention is clear, irregularities are excused in the case of wills, which would be fatal to other deeds; thus, a will was sustained where the minister had signed the testator's name instead of his own, but had signed his own name to a statement certifying that fact,[8] and a testament or codicil was sustained, though neither

---

[1] E. iii. 9, 5. Tait on E. 305.—[2] E. iii. 9, 15.—[3] 6 & 7 Wm. IV. c. 22.—[4] Duff on Deeds, 13. Crosbie *v.* Pickens, 30th November 1749, M. 16814, see Suttie *v.* Ross, 23d July 1838.—* See below, Part IV. Chap. II.—[5] Duff *v.* Fife, 30th November 1819, App. 17th July 1823. 1 W. & S. 498.—† See below, Part V. Chap. III.—[6] E. iii. 2, 23.—[7] Ibid. 22.—[8] Trail *v.* Trail, 27th February 1805, M. 15955.

holograph nor attested, its terms being adopted by an addition which was holograph.[1] It was found, however, that a document commencing with the writer's name, thus, "I William Dunlop," and very solemnly composed as the substance of a will, but unsigned, could not, though it was holograph, be given effect to.[2]

The *last* will or testament is the effectual one, and if there are any previous wills, they are considered as revoked, in as far as inconsistent with it. It is sometimes a nice point how far a later document, in the form of a will or a codicil, is intended as a substitute for, or an addition to the preceding one. Where a person by will bequeathed a sum of money to her niece, and subsequently by codicil, in which alterations were made on the will, bequeathed to her the like sum without explanation whether it was in substitution or addition to the previous bequest, it was held to be in addition.[3] A will is revokable at any time by the granter, though it expressly renounce the power to revoke, though it bear to be granted for past services, or though it be delivered to the person in whose favour it is made; but where a later will revoking a previous one is cancelled, the previous one revives.[4]

Executor.—In a Will drawn up according to the ordinary form, an Executor is named, but the nomination is not necessary, and if omitted, will be supplied by a legal provision. (*See Sect.* 7.) The executor named by the testator, if he does not succeed to any portion of the dead's part as nearest of kin, or is not provided for in the testament, is entitled to a third part of the dead's part after the debts and legacies are paid. If there is no remainder, he has no claim. The eldest son, who is heir to the heritage, and the widow, are, when named executors, entitled to this allowance. Legacies left to such executors, if less than the third, to which the law entitles them, do not supersede it, but stand in part payment of it.[5]

In England the law regarding wills, formerly in a state of great perplexity, has been regulated by statute (7 Wm. IV. and 1 Vict. c. 26). It is believed that mischief has occasionally arisen from the supposition that the rules of this act apply to Scotland. If it were to be followed, especially in those provisions which refer to real property, it would be very apt to defeat the testator's object.

---

[1] M'Intyre *v.* M'Farlane, 1st March 1821.—[2] Dunlop *v.* Dunlop, 11th June 1839.—[3] Straton's Trustees *v.* Cunningham, 10th March 1840.—[4] E. iii. 9, 5. and Iv. n.—[5] St. iii. 8, 53. E. iii. 9, 26.

SECT. 4.—*Legacies and Bequests.*

A legacy is defined as the "donation of a sum or subject to be paid or delivered by the executor out of the moveable estate of the deceased to a third person."[1] The person so favoured is termed the Legatary or Legatee. A legacy may be granted in the body of the will itself, in a separate writing supplementary to the will termed a Codicil, or by indorsing a bill to the legatee—but not by granting one to him.[2] There are three distinct kinds of legacy, Universal, General, and Special, distinguished from each other by differences of considerable practical importance.

1*st*, *A Universal Legacy* is a bequest of the whole moveable estate, or of the residue of it, after deducting the widow's portion, debts, other legacies, &c. &c. It places the legatee in the situation of representative to the deceased in as far as respects his moveable estate.

2*d*, *A General Legacy* is a legacy of something not farther particularized than by its generic description and the quantity of it bequeathed, as of money £50, without a specification of any sum of £50 which the testator may have in a particular situation; so many yards of blue cloth of a certain quality, without saying any thing to make it be understood that the testator had in his eye a particular piece of blue cloth. The legatee of a general legacy has action against the executor for the amount, and it will be no defence that a subject of the same nature was set apart by the testator, or by the executor, for the legatee, but has ceased to exist. If the fund which remains after all other claims are satisfied, is insufficient to pay the general legacies, they all suffer a proportional diminution.

3*d*, *A Special Legacy* is a legacy of a particular subject so described that it is distinguished from all other things of its kind (as, the sum of £50 due to me by A. B., the piece of blue cloth marked No. 100 in my warehouse, &c.) The legatee in this case is not confined to an action against the executor, he is entitled to consider the subject as his own, and to vindicate his title to it by action against any person in whose hands it may be. If the subject has ceased to exist the legatee loses his legacy, and has no claim on the testator's estate. Special legacies are preferable to general ones, so that if, after paying debts, there should only remain the sum or piece of property left in a special legacy, it goes to that legatee, and the general legatees get nothing. If the

[1] E. iii. 9, 6.—[2] Ibid. Th. 18, 20.

debts cannot be paid, however, without encroaching on the special legacies, these must suffer.[1]

SECT. 5.—*Conditions and Substitutions.*

A legacy in the ordinary case is only called into existence by the legatee surviving the testator, so that the representatives of a legatee who has predeceased the testator have no right to it. It is an implied condition of a bequest (as of a settlement of heritable property) that, if made in favour of a stranger at a time when the testator was childless, it is not to take effect if he leave lawful children.[2] But the presumption would appear to depend on the great extent of the bequest in comparison with the whole estate of the deceased, and to be weakened in proportion to the length of time which may have intervened between the birth of the first child and the testator's death.[3] Where the bequest is in favour of a child of the testator, on the same principle it does not lapse if the child predeceasing the testator have left offspring.[4]

When a legacy is fettered by a condition, it will depend on the nature of the condition at what time the legacy is said to "vest," so that being considered the property of the legatee, or due to him, it may be bequeathed by him, or go to his representatives if he die intestate. If the condition is an impossible one, it is held as not existing. If it can be performed by the legatee, he must have performed it before the legacy vests. If the condition is one over which the legatee has no control, but which is not certain to take place in the course of nature (as the legatee's reaching the years of majority, his having a living child, &c.), the legacy does not vest previous to the condition being accomplished; but if it is an event which must take place in the course of nature, whether the time when it will take place is known (as in the case of a particular day being named for the payment of the legacy), or is not known (as in the case of the legacy being paid on the death of an individual named), then the legacy is said to vest, and though the condition should not take place during the legatee's lifetime, yet the legacy may be bequeathed in his will, and will be payable to his proper representatives when the condition takes place.[5]

[1] E. iii. 9, 11, 12, 13, see Peat *v.* Peat, 14th February 1839.—[2] E. iii. 8, 46. Colquhoun *v.* Campbell, 5th June 1829.—[3] Yule *v.* Yule, 20th December 1758, M. 6400.—[4] Neilson *v.* Baillie, 4th June 1822. Booth *v.* Black, 8th February 1831.—[5] E. iii. 9, 9. M. St. ccoxlvi. B. P. 1881. Dill *v.* Houston's Trustees, 7th December 1839. Campbell *v.* Reid, 12th June 1840.

Substitutions.—Where there are substitutions to a bequest, the legal meaning of the expressions used is of importance. Where an unconditional legacy is left to one "and his heirs" or "his executors," it passes to his proper representatives on his dying before the testator. If in addition to "and his heirs" the testament bear "and any to whom he shall bequeath it," or "assignees," it would pass as above to his heirs, and *not* to the persons to whom he should assign or bequeath it, because he never had it to bequeath. So also a bequest simply to one "and his assignees" does not vest without survivance. When a legacy is bequeathed to one person, whom failing to another, the right of the latter is merely conditional, and takes effect only if the former die before the testator.[1] There are often difficulties in the construction of the terms where more than one person is to have the benefit of a legacy. It is held that a legacy to two persons "jointly," or "jointly and severally," goes to the survivor.[2] A legacy "to two persons equally" is equally divided, and though one predecease the testator, the other only gets the half.[3] Much litigation is often caused by indistinctness in defining legatees. One in his testament left a residue "to be divided amongst his poorest friends and relations, whom he had forgot therein, or in any other deed to be made by him, &c." The court found the trustees named by the testator vested with a discretionary power to divide the fund among the poorest relations on both sides, and ordained them to report their proposed division to the court.[4] Where a testator's expression was "the whole of my nephews and nieces," it was found to include nephews and nieces by the half-blood.[5] Where an annuity of £300 was left to a son, and declared to be payable, if he left lawful children, "to the said children, equally amongst them during their respective lives," it was held that the annuity was not to suffer a proportional abatement on the death of each child, but must be payable in full down to the death of the last survivor.[6]

In a special case, where one had left his property to all his nephews and nieces, and provided that if any one of them predeceased him, the share of such one should be divided among his other children—the children of a niece who had died before the date of the testament were found to have no share.[7]

[1] E. iii. 9, 9, and Iv. n. B. P. 1878.—[2] B. P. 1879.—[3] Rose *v.* Roses, 15th January 1762, M. 8101.—[4] Trustees *v.* Relations of Brown, 3d Aug. 1762, M. 2318.—[5] Norris *v.* Norris, 11th December 1839.—[6] Mackenzie *v.* Dickson, 11th March 1840.—[7] Sturrock *v.* Binny, 29th November 1843.

It is held that where a trust is created, the interpretation of terms of substitution is not so favourable as in other cases, to the vesting in the parties first in order when they predecease the others,—that, "If there be a trust with an ulterior destination, if nothing shows an opposite intention, it will be held that that destination will not easily be defeated by holding the subjects of the bequest to vest." In the case where this was laid down, the money bequeathed was put in trust to be divided between grand-nieces, but with the provision that it was to be lent on heritable security, the interest to be payable to them in liferent, and to their children in fee, and in case of the death of any without children, her share to go to the survivors. The share of one of the legatees who survived the testator, but died before the distribution, was found not to have vested.[1]

SECT. 6.—*Taxes on Succession.*

The moveable estate of the deceased, in passing to his successors, is subject to taxation. 1*st*, On the expeding of Confirmation (*see below*) a duty is paid on the Inventory of the whole succession at its gross value, without deduction on account of debts which may be to be paid from it.[2] A proportional repayment is made when all the debts are paid, if applied for within three years; but the funeral expenses, and those connected with the inventory, &c. are not allowed for.[3] If any casual omission is made in the inventory, it may be amended, and otherwise omissions and neglects are provided against by penalties.[4] There is no duty where the estate is under £20; from that sum to £100 it is 10s., and from £100 to £200, 20s.[5] 2*d*, Each individual legacy of £20 and upwards pays a separate duty, rising by a scale adjusted to the compound ratio of the distance of relationship between the testator and legatee, and the amount of the sum. Where the legatee is a lineal descendant or ancestor, the duty is one per cent.; where he is a stranger, it is ten per cent.[6] Certain sums succeeded to according to the rules of savings banks are exempt.[7]

---

[1] Robertson *v.* Richardson, 6th June 1843.—[2] 55 Geo. III. c. 184. Sch. Part III.—[3] Ibid. § 51. Jur. St. ii. 605.—[4] 55 Geo. III. c. 184, § 37-44. —[5] Ibid. Sch.—[6] Ibid.—[7] 9 Geo. IV. c. 92, § 41.

SECT. 7.—*Confirmation of Executor.*

The ceremony by which the moveable estate of the deceased is taken possession of, and applied to its destined purposes, is called Confirmation. It proceeds before the sheriff of the county in which the deceased was domiciled, acting as Commissary.[1] If the deceased was permanently resident abroad when he died, the confirmation should be expede in Edinburgh.[2] Confirmation is a decree authorizing the executor, upon making up inventory of the moveable estate of the deceased, to recover the property by the proper legal means, and administer it for those having interest. Where an executor is named in the testament, he is entitled, on producing that document, with a full inventory, to be confirmed. The process is in such case called Confirmation of a Testament Testamentar.[3]

When an executor is appointed by the commissary, the nomination proceeds on an *Edict*, or intimation to all concerned to appear on the occasion of the confirmation of an executor.[4] The order of choice is as follows:—1*st*, A universal legatee (*see Sect.* 4.); 2*d*, The next of kin; 3*d*, The widow; 4*th*, A creditor—who may be confirmed to the extent of his debt, if it be constituted by a written obligation of the deceased, or the decree of a court; 5*th*, A legatee may be confirmed; and, 6*th*, The procurator-fiscal of the court; but it is said that the last case never occurs in practice.[5] All executors-dative must find caution to the satisfaction of the court. In all cases of confirmation, except that of executor-creditor, the executor gives in his inventory on oath, and he is entitled to eik to it such parts of the estate as may afterwards be discovered. If any portion is omitted, a person having interest may apply to be confirmed to the extent of the omission, or to have the executor compelled to make the addition. An executor-creditor must make oath to the amount of his debt, and give notice in the Gazette.[6]

Formerly confirmation was necessary to vest the property in the next of kin, if there were no testament, so that if he died without confirmation, the succession reverted to those who would have succeeded had he not existed. Confirmation is now, however, only necessary as an active title, to

[1] 4 Geo. IV. c. 97, 11 Geo. IV. & 1 Wm. IV. c. 69. 6 & 7 Wm. IV. c. 41.—[2] E. iii. 9, 29. 11 Geo. IV. & 1 Wm. IV. c. 69, § 31.—[3] E. iii. 9, 27. —[4] Ibid 32. B. C. ii. 81.—[5] 1695, c. 41. E. iii. 9, 32. B. C. ii. 81, *et seq.* Jur. St. ii. 506.—[6] E. iii. 9, 36, 37. 4 Geo. IV. c. 98.

enable the executor to pursue for the debts due to the deceased.[1] A debtor is not bound to pay where there is no confirmation, unless he have given the executor a corroboration or acknowledgment of the debt.[2] There is an exemption from the necessity of confirming in favour of persons succeeding to certain sums payable by savings banks and friendly societies.[3]

SECT. 8.—*Duties of Executor.*

The laws of preference to which the executor has to attend in paying the legacies has been above discussed. (*See Sect.* 4.) The payment of the testator's debts is a farther part of his duty as trustee for all concerned. Some of these are called *privileged*, they may be paid by the executor without any sanction, and must be paid before other debts.*

With regard to ordinary debts, if legal diligence at the instance of the creditor have proceeded so far against the debtor during his lifetime as to form a complete attachment, as by Poinding, Arrestment, &c., it may be completed against his effects after his death, as by Order of sale and payment, or Decree of Forthcoming.[4] An executor may refuse payment of an unprivileged debt, not made real as above, until the creditor takes decree against him.[5] The period of six months after the death of the deceased is allowed for the creditors to come forward. Within that period the executor cannot pay any unprivileged creditor, even if he has obtained decree, and all creditors who cite the executor within that time have an equal right according to the extent of their debts, to share in the divisible funds. The action against the executor may, to save expense, be conducted by a trustee for a number of creditors concurring. Even after the six months, a creditor who raises a citation before the funds are divided is entitled to his share in the division, and one who gets himself confirmed executor-creditor has a preference. After having satisfied those who have so obtained a preference, the executor may pay with any remaining funds the first creditor who makes application, and if he do so without decree he will be responsible, not for the existence of funds sufficient to pay creditors who may afterwards appear, but only that the debt he paid was a just one.[6] The creditors of

[1] E. iii. 9, 36, 37. 4 Geo. IV. c. 98. B. C. i. 141.—[2] Watson v. Marshall, 19th June 1782, M. 7009.—[3] 9 Geo. IV. c. 92, § 41. 5 & 6 Wm. IV. c. 57, § 4. 10 Geo. IV. c. 56, § 24.—* For these see Index, *Privileged Debts*.—[4] B. C. ii. 83.—[5] E. iii. 9, 43.—[6] A. S. 28th February 1662. E. iii. 9, 45. B. C. ii. 86, *et seq.*

the executor have of course a right to attach any reversionary interest which he may have after the distribution of the fund. The creditors of the deceased have a constant preference, while the property he left can be clearly identified from the executor's own funds, and they have in all cases a preference for a year.[1]

Vicious Intromission.—The executor is liable to those interested in the succession only to the extent of the inventory, and for the application of ordinary care of the property intrusted to him. Any one, however, who enters on possession of any part of the moveables without confirmation, commits what is called a *quasi delict*, or fictitious crime, called *vicious intromission*, and the punishment of it is the liability of the intromitter for the debts of the deceased. The rule, however, undergoes an equitable restriction. If the intromitter be executor-nominate, next of kin, or universal legatee, and as such the person who should take the office of executor, he is saved from responsibility if he confirm within a year. If he is a stranger he is saved from responsibility for a debt if he confirm before being cited by the creditor. On all occasions the law looks more to the intent than to the act, and if there appears to be no fraud, any colourable title, such as an understanding that the property was his own, will save the intromitter from responsibility.[2]

CHAPTER III.

Strict Entails.

Sect. 1.—*General Nature.*

A person, who is the absolute proprietor of an heritable estate, may so destine it that it must descend to a certain series of heirs, who cannot disappoint each other of their right of succession; this is done by a deed of Entail. The chief essentials of a strict entail are, that such restrictions as it may contain are enforced by an Irritant and a Resolutive clause.[3] The former annuls and renders void any deeds

---

[1] 1695, c. 41. E. iii. 9, 43. B. C. i. 90. Tait *v.* Kay, 12th February 1779, M. 3142.—[2] E. iii. 9, 49-53, M. St. ccclxv.—[3] 1685, c. 22.

which may be granted against the prohibitions of the entail, while the latter resolves or forfeits the right of the person who grants the prohibited deed.[1] These clauses must apply to the acts prohibited; the entail will not be efficacious so far as respects acts to which they do not refer.[2] Every entail to be effectual against third parties must be recorded by warrant of the Court of Session in a special register kept for the purpose, and must be followed by a recorded sasine (*see above*, p. 55), containing the prohibitory and the irritant and resolutive clauses.[3] While the entail remains unrecorded, however, it binds a person who holds by virtue of it, and consequently applies to all persons who may derive a title through him.[4] An entailed estate is liable to the claims of creditors, so long as the entail is not on the record of entails, and where creditors do not find it there, they may safely contract with the heir in possession, though they know it exists. They cannot be defeated by a subsequent registration.[5] The clauses to be binding on third parties must not only be inserted in the first, but in all future investments, and this is generally made an obligation on the heirs in the body of the entail.[6]

The first person called to the succession under the entail is called the Institute, and the property is disponed or conveyed to him as one transfers property to a third party, so that he makes up his titles in the same manner as a purchaser. (*See below*, p. 168.) The others are called Substitutes, and they make up their titles as heirs of provision.[7] (*See above*, p. 100.) Every person called to the succession, down to the most remote substitute, has an interest in seeing the conditions of the entail complied with, and may bring a Declarator of Irritancy against the heir contravening, if the immediate next heir do not do so.[8] No person can gratuitously make an entail which shall preserve his estate from his own debts, but it has been decided that where a mutual entail was executed between a father and his daughter's husband, that the estates were protected from those debts of the husband contracted since the date of the entail, which were not made real by diligence.[9] (See Index, *Adjudication.*) The fetters of an entail may be worked off by possession on a different title during the years of prescription (*see* p. 59).

[1] E. iii. 8, 25. S. on Ent. 61.—[2] Bruce *v.* Bruce, M. 15539. Mackinnon *v.* Caithness, 26th February 1846.—[3] 1685, c. 22. S. on Ent. 143, *et seq.*—[4] E. iii. 8, 27. S. on Ent. 158, *et seq.*—[5] S. on Ent. 160. Ross *v.* Drummond, 3d March 1841, affirmed 4th September 1844.—[6] 1685, c. 22. E. iii. 8, 27, 28. S. on Ent. 143.—[7] S. on Ent. 231, *et seq.*—[8] E. iii. 8, 32. S. on Ent. 245.—[9] Agnew *v.* Stewart, App. 31st July 1832. 1 Sh. 320.

If an entailer in virtue of a power to alter, make a new entail, and the lands be held on an infeftment under that new entail unrecorded, for forty years, the old entail is prescribed, and the new one not being recorded, the title to the estate is that of free proprietorship.[1]

SECT. 2.—*Legal Interpretation of Restrictions.*

All the prohibitions in an entail must, to be effectual, be distinct, intelligible, and precise, as the law will not sanction restrictions on the commerce of land by inference, nor if their application to any particular party be omitted, will it be allowed to be inferred.[2] When some prohibitions are fortified by the proper irritant and resolutive clauses, and others are not, advantage can be taken of the unfortified prohibitions, for evading, by fictitious proceedings, those which are fortified.[3] The later decisions, however, show an inclination to give more effect to the distinctly expressed meaning of parties, though the terms used may be open to verbal criticism, than the older decisions exhibit.[4]

A prohibition to alienate strikes at any attempt which will virtually have that effect. Where the prohibitive clause forbade "to sell, alienate, and dispone," but the resolutive clause was only against "alienating or disponing," a sale was barred.[5] Leases granted beyond the period requisite for the purposes of good husbandry are generally decided to be alienations, especially if the heir in possession profit by them to the prejudice of his successor.[6] Thus, in the Queensberry cases, leases granted for ninety-seven years on a grassum were found to be alienations,[7] and in the case of the March entail, leases for fifty-seven years were in the same position.[8] Leases for forty years, and for thirty-one years, have been reduced in the case of prohibition to alienate.[9] On a lease being granted for thirty-one, twenty-nine, twenty-seven, twenty-five, or twenty-one years as the court should

---

[1] Stewart *v.* Stewart, 23d May 1844.—[2] Campbell *v.* Breadalbane, 23d November 1838, affirmed 1st April 1841. Lang *v.* Lang, 23d November 1838, reversed 16th August 1839.—[3] Cochrane *v.* Vernor, 21st February 1844.—[4] See Braimer *v.* Bethune, 18th January 1839. Craig *v.* M'Culloch, 21st February 1839. Lumsden *v.* Lumsden, 26th November 1840, affirmed 18th August 1843. Anstruther *v.* Anstruther, 26th November 1840, affirmed 18th August 1843. Lockhart *v.* Lockhart, 20th May 1841. —[5] Murray *v.* Murray, 26th February 1842, affirmed 4th September 1844. —[6] S. on Ent. 175.—[7] Queensberry's Trustess *v.* Wemyss, 17th July 1813. App. 2 Dow, 90.—[8] App. 2d July 1819, 1 Bligh, 539.—[9] Malcolm *v.* Bardner, 19th June 1823. Stirling *v.* Walker, 20th February 1821.

decide, it was sustained to the extent of twenty-one years.[1] The terms which have hitherto been held to exclude leases prejudicial to successors are "alienate," "dispone," "put away," "or dilapidate," "let below diminution of the rental," or "below the just avail."[2] A prohibition against the diminution of the rental is understood to enforce not merely the rents at which the lands may have been let, but those which they are worth, and it has been held an infraction to renew leases on the old rent when a grassum is taken,[3] or to grant a lease at the old rent or even a higher rent (but which is still inadequate), with an understanding that the tenant shall act as trustee, sub-letting the land, and making over the difference of rent to the heir in possession, or some one favoured by him.[4] The prohibition to alienate is effectual against provisions to widows and children, except to those protected by the statutory privileges, and the widow's terce, which however may be specially excluded.[5]

A prohibition to contract debt is another ordinary restriction. Unless the conditions of registration and others above noticed be complied with, such a prohibition has no effect against creditors, whatever it may have between heirs. When the requisites are completed, the estate is protected from diligence in the hands of successors, or of onerous entailers.[6] Where the prohibitory clause was levelled against contracting debt, and the irritant clause declared that "if the heirs shall contravene the premises, by breaking the taillie, contracting of debts," &c., certain proceedings should be null, but the contraction of debt and diligence thereon were not enumerated among these proceedings, the estate was not protected from the diligence of creditors.[7] (*See Sect.* 1.)

Alteration of the order of succession is another usual subject of prohibition. The ruling principle in interpreting this class of prohibitions is, that none are to be inferred where they are not clearly expressed, but that when so expressed, they are held to strike at any attempt to infringe their spirit; and so where a power was left to grant feus, and an heir granted sixteen feus embracing nearly the whole estate, to a person whom he wished to succeed him, taking an obligation from that person to entail them on a new series of heirs, the feus were reduced as an alteration of the order of succession.[8] A

[1] Wemyss *v.* Queensberry's Executors, 12th June 1822.—[2] H. on L. and T. 73.—[3] March Leases, 1819. App. 1 Bligh, 339.—[4] M'Gill *v.* Law. S. on Ent. 203.—[5] S. on Ent. 366, *et seq.*—[6] Ibid. 73, *et seq.*—[7] Duffus's Trustees *v.* Dunbar, 28th January 1842.—[8] Ker *v.* Roxburgh, 17th December 1818. App. 2 Dow, 149.

prohibitory clause that the heir should have no power to sell or to contract debt, "nor to do or commit any fact or deed" by which the lands might be evicted or adjudged, or any ways affected in prejudice of the heirs, but containing no substantive prohibition against altering the order of succession, was found not a prohibition against an alteration.[1] Where an entail left liberty "to provide younger or other children besides the heir, to three years' free rent," it did not sanction the laying out of such a sum in the purchase of lands to be entailed to a younger son, and the deed by which this was attempted to be accomplished was found valid only to the extent of the younger son's liferent.[2]

SECT. 3.—*Statutory Limitations of Entails.*

Leases.—Heirs of entail, notwithstanding any prohibitions, may grant agricultural leases for fair rents, and without grassums, for twenty-one years, and leases of minerals for thirty-one years, provided they do not interfere with the pleasure-grounds, parks, &c. about the mansion-house.[3] For the promotion of agricultural improvements, leases may be granted for fourteen years and one existing lifetime, for two existing lifetimes, or for thirty-one years.[4] Such a lease, if for two lives, must contain a condition that the tenant is to enclose the whole land within thirty years, two-thirds within twenty years, and one third within ten years, should the lease last to any of these periods; and every lease for more than nineteen years must contain a clause, obliging the tenant to enclose the whole land during the currency, two-thirds before the expiration of that proportion of the period, and a third before the expiration of a third.[5] A lease for two lives, or a term exceeding nineteen years, must oblige the tenant to repair the fences, and to make no enclosures of fields exceeding forty acres of area, except they be of hill or other unploughable land.[6] Building leases may be granted for the period of ninety-nine years, if no more than five acres be granted to one person, and there be an obligation that a dwelling-house, worth at least £10, shall be built and kept up on each half acre; such buildings must not be erected within 300 yards of the mansion-house.[7] Improving and building leases are not to be granted on reduced rents, or for

---

[1] Trotter's Trustees *v.* Gordon, 10th March 1840.—[2] Strathallan *v.* Northumberland, 20th May 1840.—[3] 6 & 7 Wm. IV. c. 42, § 1.—[4] 10 Geo. III. c. 51, § 1.—[5] Ibid. § 2.—[6] Ibid. § 3.—[7] Ibid. §§ 4, 5, 6.

grassums, or till within one year of the termination of any previous lease.[1]

Excambions.—Heirs of entail may excamb or exchange portions of their estates for other property adjacent to, or which may be more conveniently held with the entailed property, on giving notice to the next five heirs of entail, if there be so many, and obtaining the sanction of the court. The land so added to the entailed estate is held in terms of the entail,[2] but the contract does not require to embody all the destinations and restrictions of the entail, provided a distinct reference be made to it.[3]

Entailer's Debts.—Formerly the debts of the entailer could not be paid from the estate, but had to be enforced by legal diligence; they may now be paid under the sanction of the court.[4]

Improvements.—An heir of entail in possession may burden his successors for planting, draining, erecting buildings, &c. to the extent of four years' rent.[5] When the amount of four years' rent has been laid out by preceding heirs, and remains a charge, the heir in possession cannot lay out any more.[6] Creditors for such repairs are preferable, and may use any diligence against the successive heirs, except adjudication against the estate.[7] At the same time, an heir in possession may free himself of all responsibility by assigning a third part of his free rents.[8] The creditor, to secure his preference, must make his claim within two years after the death of the proprietor, who expended the money, and must within six months after the two years, if the money is not paid, raise an action and proceed to diligence.[9]

Provisions to Wives and Children.—No heir in possession can be burdened to the extent of more than two-thirds of the clear annual income from the estate by statutory provisions to the spouses and children of his predecessors.[10] The annual income must be with deduction of burdens, but the income-tax has been held not to be a burden to be deducted.[11] With this restriction, heirs in possession may provide for their families thus,—an heir may infeft his wife in a liferent equal to one-third, and an heiress may infeft her husband in a liferent equal to one-half, of the clear annual

---

[1] 10 Geo. III. c. 51, § 7.—[2] 6 & 7 Wm. IV. c. 42, §§ 3, 5.—[3] 4 & 5 Vict. c. 24.—[4] 6 & 7 Wm. IV. c. 42, § 7.—[5] 10 Geo. III. c. 51, §§ 9, 10.—[6] Ibid. § 13.—[7] Ibid. § 17.—[8] Ibid. §§ 16, 19.—[9] Ibid. § 20.—[10] 5 Geo. IV. c. 87, § 13.—[11] Maclaine *v.* Maclaine, 29th November 1845.

rent.[1] No more than two liferents can subsist at one time, but a successor may be nominated before the death of any liferenter.[2] Heirs in possession may grant bonds of provision to their lawful children, which must not exceed,—for one child one year's free rent (after deducting all burdens, including provisions to widows, &c.), for two children two years' free rent, and for three or more children three years' free rent. Unless where it is stipulated for in the marriage-contract of the child, the provision becomes extinct on the death of the child for whom it is intended.[3] When an estate has been burdened for provisions to children to the extent of three years' free rent, it can be burdened no farther till some part of the burden has been extinguished.[4] Provisions exceeding the legal amount are not null, but reducible as to the excess.[5] The provisions can only be made good against the rents, and cannot be made the means of attaching the property.[6] Children may claim their provision with interest on the expiration of a year after the death of the granter.[7] An heir pursued for a provision to the children of a predecessor may be discharged by assigning one-third of the free rent of the estate until it be extinguished.[8] In one case where a provision in a child's marriage contract was made payable by general representatives to trustees, an attempt by a separate deed to throw the burden on the heir of an entailed estate belonging to the parent was defeated.[9]

Churches and Schools.—A special act enables heirs in possession and with their title completed, if they be of age, and if they are under guardianship, enables their guardians, to grant feus or leases for places of worship or schools, with corresponding area for the house of the minister or the schoolmaster, or for a churchyard or playground.[10] The space that may be awarded is thus limited—a quarter of an acre for a church with an acre for burying ground; an acre for a schoolhouse and playground, an eighth of an acre for the dwelling-house, and half an acre for the garden of the minister or schoolmaster. The periodical consideration to be paid for the property may be less than its just value, but the heir who grants the right must not take to himself any grassum or other sum payable exclusively to himself, and not generally distributed over a continuance of time.[11] The transaction must proceed on a decision of the sheriff, founded on an

---

[1] 5 Geo. IV. c. 87, §§ 1, 2.—[2] Ibid. § 3.—[3] Ibid. §§ 4, 5.—[4] Ibid. § 6.—[5] Ibid. § 7.—[6] Ibid. § 8.—[7] Ibid. § 9.—[8] Ibid. § 10.—[9] Breadalbane's Trustees *v.* Breadalbane, 26th May 1840.—[10] 3 & 4 Vict. c. 48, § I.—[11] Ibid.

application made to him in the special terms provided by the act, and the next heir if he have not given his assent must be cited in terms of the act.[1] The title is completed by recording the charter, in the general register of sasines.[2] The parties holding such rights in trust must not alienate or burden them, and deeds to the contrary are void.[3]

Public Works.—In local acts for public works—such as railways, harbours, &c., it has been usual to obtain special powers to deal with heirs of entail for the conveyance of lands. In the "Lands' Clauses Consolidation Act," permanent provision is made for accomplishing such transactions under judicial control, in all works conducted under future local acts.[4]

---

[1] 3 & 4 Vict. c. 48, § 3.—[2] Ibid. § 5.—[3] Ibid. § 6.—[4] 8 & 9 Vict. c. 19, § 7.

PART IV.

OBLIGATIONS AND CONTRACTS.

CHAPTER I.

Qualities necessary to render Obligations Binding.

Sect. 1.—*Offer and Acceptance.*

Consent.—As all contracts are founded on consent, the question, whether a man has bound himself or not, will depend on the previous one, whether he has or has not given evidence of consent to be bound. Lord Stair has divided the process of giving consent into three different grades,—first, a desire or intention to agree to the terms,—second, a resolution or intention of becoming bound,—and, third, the actual engagement.[1] Accordingly, where only the first or second process has taken place, the law considers that there is no contract. A Promise, if absolute and unconditional, is binding, but if conditional, it only becomes so on the fulfilment of the condition. An Offer is a promise subject to the condition of Acceptance, and until it is accepted the person who makes it is not bound.[2]

Mistakes.—It is an essential ingredient of consent that the party should understand the nature of the obligation he intends to come under, and the subject of it, and therefore if one finds that where he thought he had agreed to let a subject, he is understood by the other party to have agreed to sell it, or that where he thought he had promised to A, he is understood to have promised to B, there will in the general case be no binding obligation.[3] The mistake, however, must be essential to the foundation of the contract, and the dis-

---

[1] St. i. 10, 2.—[2] Ibid.—[3] E. iii. 1, 16.

crepancy such as entirely to alter its nature; thus error as to the person will only vitiate a contract if personal identity be of importance, as in a contract of marriage, or of service, or any contract in which personal credit is taken into view.[1] It frequently happens that bargains are made on the information of scientific persons or others supposed to be better acquainted with the real state of matters, than the parties themselves. In such cases when the source of information is referred to, but not warranted as correct, the party is not responsible for error or misrepresentation, unless fraud can be proved against him. Thus, a party having obtained from a mining engineer a report that there was valuable coal on his ground, let the coal with reference to the report, and it turned out to be unworkable: it was found that unless fraud could be substantiated, the lessee had no ground of reparation against the lessor.[2]

Persons incapable or presumed to be incapable of consent cannot be bound by their deeds. This extends to madmen and idiots, whose sanity will generally be the subject of a trial by jury. If the granter has been cognosced,* there is a presumption against his sanity, and it must be specifically proved that he was of sound mind when he granted the deed; on the other hand, if he has not been cognosced, he is presumed to have been of sound mind until the contrary be proved.[3] Persons who have been "interdicted" from disposing of their heritable property, on application to the Court of Session, on account of their improvident and facile character, cannot properly be called incapable of consent in any way, but their deeds as to heritage may be reduced on the ground of lesion or injury to their estate.[4] †

SECT. 2.—*Effect of Fraud, Force, or Fear.*

One may resist fulfilling or may reduce an engagement to which he has given his consent from the influence of fraud, force, or intimidation.[5]

Fraud.—Where the existence of the contract is owing to a fraud, it becomes ineffectual; if the fraud has merely been incidentally committed in the course of the transaction, it founds a claim of damages.[6] Fraud is generally committed

---

[1] St. i. 9, 9. E. iii. 1, 16. B. C. i. 295.—[2] Campbell *v.* Boswall, 27th February 1841.—* See above, p. 43.—[3] E. i. 7, 51. B. C. i. 137.—[4] E. i. 7, 54.—† As to the deeds of minors see above, p. 42, and as to Interdiction, p. 44.—[5] St. i. 9, 8. E. iii. 1, 16.—[6] E. iii. 1, 16. B. C. i. 242.

—1. By misrepresentation or concealment of material circumstances. Thus, where an agent having got decree for a debt believed to be desperate, concealing from his client the small amount he was entitled to charge for his professional exertions, and exaggerating the difficulties and risk in the way of obtaining payment, prevailed on the client to be content with a small portion of the sum, leaving the remainder to the agent, the transaction was found to be void.[1] On the same principle, it is held, that where a manager of a company prevails on one by misrepresentation and concealment of the insolvent circumstances of the company to relieve him of his shares, it is such fraud as will void the contract.[2] 2. Taking advantage of drunkenness is a species of fraud which may be a good ground for relieving one from an obligation contracted under such circumstances, especially if enticements to inebriation have been held forth.[3] It has been held in England that a state of absolute deprivation of reason by intoxication invalidates a deed.[4] 3. A person of imbecile mind, or whose faculties are weakened by age, though not incapable of binding himself, is a more special object of protection from the machinations of the fraudulent than a person of ordinary judgment, and a less dexterous project of fraud and deception will be sufficient for the reduction of an obligation incurred by such a person.[5]

Force, Fear.—The degree of violence, or the nature of the threats, which will render a deed reducible, will depend on the constitution and position of the party against whom they are used. The violence, from the consequence of which a man in the prime of life is protected, must be of a much more serious nature than that which will justify interference in the case of a female in bad health or advanced in life. The force or intimidation must be sufficient to overcome the will, and "compel one to do that which, of his proper inclination, he would not have done."[6] To compel one to fulfil or corroborate an obligation by due course of law, however harsh the measures resorted to may be, is not a ground of reduction; but it will be so if one pursue for an obligation, and, under the infliction or threat of harsh legal pro-

---

[1] Taylor *v.* Long. App. 28th May 1824. 2 Sh. 233.—[2] Brown *v.* Syme, 8th March 1834.—[3] Johnston *v.* Brown, 15th November 1823.—[4] Sir W. Grant in Cooke *v.* Clayworth, 1811, 18 Ves. 12.—[5] E. iv. 1, 27. Graham *v.* Blair, 1st February 1715, 5 B. Sup. 120. M'Neill *v.* Moir, App. 21st May 1824, 2 Sh. 206. M'Diarmid *v.* M'Diarmid, App. 28th March 1828. 3 W. & S. 37. Morison *v.* Moir, 20th December 1841.—[6] St. i. 9, 8.

ceedings, obtain another obligation, not corroborative, but of a different nature; and an obligation so obtained, though corroborative of the original debt, if it exceed it, will be cut down.[1] Thus, where one in prison for debt was prevailed on to give his creditors an absolute disposition to his house, the deed was reduced in as far as it was an absolute conveyance, but was retained as a security for any debts which might be proved.[2] That it was granted under the influence of threats or violence towards a near relation of the granter, is a good ground of reducing a deed, as in an old case where a bond was obtained from a son by apprehending his aged father on an illegal caption, carrying him to the hills and threatening him with death.[3]

SECT. 3.—*Completion of imperfect Obligations by Homologation and* Rei Interventus.

Some obligations cannot be incurred without the intervention of writing, and other ceremonials (*see below, Chap.* II.); others are completed by simple consent, and writing is but the evidence of that consent. In either case, if the engagement is not completed by the necessary evidence of consent being given, there is room for the party to retire, unless there have taken place Homologation or *Rei interventus.*

Homologation consists in the individual who has entered on the incomplete engagement, knowingly and willingly doing acts in furtherance of its purpose.[4] A deed which is declared null for want of certain formalities may be homologated, but not (it is maintained) a deed by one incapable of consent, as an idiot or pupil.[5] (*See above*, pp. 43, 125). The act must unequivocally refer to the imperfect obligation, and show an intention by the party to depart from any ground of challenge known by him to exist, and to adopt the imperfect obligation as his own;[6] and so if a party is ignorant of the facts, or, it would seem, of the law which would entitle him to challenge the obligation, he will not be held to homologate it.[7] The mere signing as witness will not homologate a deed, as the proper purpose of the signature is solely to attest, not the terms of the writing, but the granter's subscription;[8] but in the case of a near relation so signing, it is

[1] E. iv. 1, 26.—[2] Fraser *v.* Black, 13th December 1810.—[3] M'Intosh *v.* Farquharson, 18th June 1672. 2 B. Sup. 634.—[4] E. iii. 3, 47.—[5] Ibid.—[6] Ibid. 48.—[7] Johnstone *v.* Paterson, 29th November 1825. Gardner *v.* Gardner, 3d December 1830.—[8] Walwood *v.* Taylor, 19th July 1625, M. 5629.

inferred (and perhaps the reverse would require to be specifically proved), that he knew the contents of the deed, and his attestation is held a homologation; as where one signed as witness his son's contract of marriage.[1] Where an heir, however, attests a deed granted by his father on deathbed (*see above*, p. 97), it is held that he may have other motives for doing so than an acquiescence in the contents, and homologation does not take place.[2] Homologation by a party entitled to challenge or resile from an imperfect obligation, cannot affect the right of a third party not deriving his title through him.[3]

Rei interventus takes place when one of the parties to a contract not formally completed allows the other to act as if the obligation were complete and binding, so that he will be a loser if it be not fulfilled by both. Homologation operates in gratuitous obligations, but the proper subject of *rei interventus* is an onerous obligation, where something is to be done or given on both sides. The best illustration of *rei interventus* is that of a purchaser paying the whole or part of the price in implement of an imperfect contract of sale.[4] It is essential that a party, before he can be bound by *rei interventus*, should know that the other is proceeding on the faith of the agreement.[5] In one case a cautioner for a loan was bound by a vitiated bond, he having been present when the loan was completed, received the money as agent of the principal party, and paid it away for his behoof. Here homologation and *rei interventus* were united.[6] Operations under a cash credit were held *rei interventus* to validate an imperfect obligation to relieve the cautioner.[7] (*As to* Rei interventus *in Leases, see this head in Index.*)

SECT. 4.—*Illegal and Immoral Engagements.*

There are some contracts which, owing to the injury done to the community by the circumstances out of which they arise, are null by statute, or will not be given effect to by any court of law.

An obligation granted on the condition of committing a crime, or some breach of morality or decency, or which acts as an incentive to any such breach of morals, will not be given effect to. Thus, a bond as the price of prostitution is

[1] Johnston *v.* Berry, 7th July 1725, M. 5657.—[2] Dallas *v.* Paul, 13th January 1704, M. 5677.—[3] E. iii. 3, 49.—[4] Ibid. 2, 3.—[5] B. C. i. 329.—[6] Hamilton *v.* Wright, 12th February 1838, App.—[7] Ballantyne *v.* Carter, 21st January 1842.

void;[1] but a bond, as a provision to a female who has lived in prostitution with the granter, may be supported if it be merely a provision to a person injured, and not an inducement to farther immorality. "But the favour indulged to bonds of this description is withheld where the grantee is a prostitute, or where she knew the granter to be married at the time of their connexion."[2] Contracts or obligations as to libels, nuisances, and indecent publications, cannot be enforced.[3]

Gambling, &c.—Obligations as to debts incurred in gambling are null in the hands of one of the original parties, but not in those of a third party,[4] being placed in the same position as obligations affected by the usury laws. (*See below*, p. 132.) Debts incurred by wager are not given effect to by the courts of law.[5]

Liquor Act.—No action can be maintained for the price of spirituous liquors, unless purchased to the amount of 20s. worth at one time.[6] The law cannot be evaded by adding several items together to make the whole amount to 20s., unless they individually exceed that sum.[7] It was found, where there was an account for liquor and other articles, that the creditor might impute indefinite payments of money to the liquor part of it, and pursue before the small debt court for the remainder.[8]

Marriage-Brokerage.—Obligations connected with contracts to bring about marriages are null;[9] and so are obligations creating a restraint on marriage, such as an obligation to pay so much if one do or do not marry, or if one marry a particular person.[10]

Contracts inferring permanent restraint on personal freedom are unfavourably viewed; and, in an old case where certain fishing boats' crews agreed for three nineteen years to be astricted to particular boats, the contract was reduced. In this case, however, the individuals were minors when they engaged themselves, and no practical line seems to have been laid down as to the extent to which one may bind himself.[11] Contracts infringing the freedom of commerce or of

[1] Hamilton *v.* De Gares, 26th January 1765, M. 9471.—[2] B. C. i. 299.—[3] Ibid. Poplett *v.* Stockdale, 1 R. & M. 337.—[4] 9 Anne, c. 14. 5 & 6 Wm. IV. c. 41.—[5] Wordsworth *v.* Pettigrew, 15th May 1799, M. 9524.—[6] 24 Geo. II. c. 40, § 12.—[7] Circuit App., Alexander *v.* Boyd, 10th March 1824, 2 S. D. 788.—[8] Murphy *v.* Reid, 18th May 1839.—[9] Thomson *v.* Mackaile, 14th February 1770, M. 9519.—[10] B. C. i. 301. Baker *v.* White, 2 Vern, 215. See Lowe *v.* Peers, Burr, 2225.—[11] Allan *v.* Skene, December 1728, M. 9454.

labour are in the general case void, such as engagements not to exercise any particular trade or profession; but a person may, for a reasonable consideration, engage to leave a certain field of exertion open to another, and in viewing how far such a contract is legal, the court will consider whether the extent of the exclusion is necessary for protecting the individual who has bought off the other party.[1] Thus, where one became assistant to a surgeon on condition of not practising within ten miles of the same town under a penalty, the obligation was held good,[2] but it was held that a similar obligation covering a diameter of 200 miles should be void as unreasonable.[3]

Obligations interfering with the course of justice are illegal, as a bond to avoid prosecuting or to procure pardon for an offence.[4] By an old act, it is declared illegal for any judges, officers of court, counsel, or agent, to purchase property under litigation before their respective courts.[5] The act, however, does not (it would seem) render such bargains null, it merely renders the purchasers liable to deprivation of office or profession.[6] Contracts by which a law-agent or counsel undertakes to conduct a case for a share of what is recovered are not binding.[7] Thus, where an agent engaged to take the half of certain property if he gained a case concerning it, and to charge nothing if unsuccessful, the engagement was found not binding, independently of any allegation of fraud.[8] Where a country agent bound himself to employ an Edinburgh agent in the business of his clients, and to make advances to him, stipulating for a share in the profits, the contract was held illegal, as prejudicial to the interests of clients.[9]

A condition by those who have the patronage of a public office, inconsistent with its constitution, to the effect that a candidate, if chosen, shall hold the situation at their pleasure, is illegal,[10] and so is an obligation by a successful candidate to pay over part of the salary to another candidate, though undertaken at the direction of the patrons.[11] But it is said, that "where there are several candidates for an office, it would seem not to be unlawful for one of them who retired from the contest to stipulate with any other, that, in the

[1] Homer *v.* Ashford, 26th November 1825, 3 Bing. 322. Horner *v.* Graves, 13th June 1831. 7 Bing. 735.—[2] Davis *v.* Mason, 25th January 1793. 5 T. R. 118.—[3] Horner *v.* Graves, *ut supra*.—[4] Stewart *v.* Galloway, 3d June 1752, M. 9465.—[5] 1594, c. 220.—[6] Purves *v.* Keith, 20th December 1683, M. 9500.—[7] St. i. 10, 8.—[8] Johnston *v.* Rome, 1st February 1831.—[9] A *v.* B, 12th May 1832.—[10] Duff *v.* Grant, 20th February 1799, M. 9576.—[11] Thomson *v.* Dove, 16th February 1811.

event of his being successful, he should pay a certain sum to the one who had retired."[1] On this subject, however, Professor Bell says, "I cannot see much reason to hesitate in discountenancing a transaction which substantially destroys the freedom of election." The same authority lays it down that "the salary of a public officer cannot lawfully be burdened with the payment of a sum as a consideration for the exertion of influence to procure the nomination," but that "an agreement by an officer in bad health to share the emolument with an assistant is effectual."[2] A contract of a depute-clerk of Session with the assistant-clerk to perform his functions was found to be illegal.[3]

SECT. 5.—*Engagements injurious to the Revenue and the National Policy.*

The courts of justice will not interpose to exact performance of contracts founded on infringements of the revenue laws, or any other legal restriction. Thus, where two British subjects joined in an adventure to the coast of Africa for the purchase of slaves, it was held that one partner had no remedy against the other for his share of the loss, but it was found that the one might compel the other to account for simple advances, though arising from the illegal adventure.[4] A bargain respecting smuggled goods cannot be enforced in favour of a party contracting in the knowledge of their being so.[5] The same rule applies to the claims of foreigners, who will not receive the assistance of our courts in contracts which involve an infringement of our revenue laws;[6] on this subject the following distinction has been taken, "that when a merchant settled abroad, whether foreigner or native of this country, simply sells goods to a smuggler *tanquam quilibit*, and makes delivery on the spot, he has action for them in our courts, though he suspected or even knew they were to be smuggled into Britain; but if he be accessory to the smuggling, and thereby to an infringement of the laws of the land, he cannot demand the aid of the British courts for recovery of his debt;"[7] and a similar doctrine has been held in England.[8] The making up of the papers of the ship, or the packing of the goods in such a

[1] M. St. lxiv. B. C. i. 128, n. 10.—[2] B. C. i. 128.—[3] Mason *v.* Wilson, 28th November 1844.—[4] Gibson *v.* Stewart, 7th March 1828, and 6th June 1834.—[5] Scougall *v.* Gilchrist, 16th November 1736, M. 9536. M'Lure *v.* Paterson, 3d November 1775, 5 Br. Sup. 532.—[6] Stoddart *v.* M'Quan, &c. 28th July 1779, 5 Br. Sup. 553.—[7] Cullen *v.* Philip, 15th May 1793, M. 9554.—[8] Holman *v.* Johnson, 5th July 1775, Cowper, 341.

manner as to facilitate the running, will be evidence of accession.[1] It is held that in Scotland no action will lie, under any circumstances, for a contract concerning prohibited goods.[2]

No contract entered into contrary to the national war policy, or between a subject of Britain and one of a country at war with Britain, can be made effectual; and during war there is a suspension of the relations of debtor and creditor between the belligerent powers. Neutrals may trade between the powers, provided they do not supply arms. The government may grant a license to an individual permitting him to carry on trade to a limited extent with an alien enemy.[3]

SECT. 6.—*Usurious Engagements.*

Although the usury laws are now much modified, and virtually abolished in relation to the classes of transactions most liable to be subject to them, it is necessary to describe them and the transactions to which they apply, as they may still be pleaded against fulfilment of the contracts not protected by the suspension acts.

The taking of interest or any other consideration for forbearing from a debt to an extent exceeding 5 per cent., renders the party, unless in the excepted cases after mentioned, liable to a penalty of three times the debt.[4] Any obligation stipulating for such usurious interest was till lately void, in terms of the act of Queen Anne; but by a statute of William IV. such documents are only to be held as granted for an illegal consideration, and so void only against those who are aware of the consideration.[5] By the same act, if the onerous holder of such an obligation be paid by the granter, the latter may recover the sum against the person who obtained the security on a usurious consideration.[6] Though the obligation do not bear the usurious consideration on its face, if it be a matter agreed on at the time, the obligation will come under the acts, but a fair stipulation will not be affected by a usurious contract following upon it.[7]

It is usury to take forehand interest at the rate of five per cent.[8] There has always been an exception to this rule in favour of bankers discounting bills, but the exception was confined to such transactions as are of service to trade, and did not apply to long discount.[9] Thus, in a case which in-

[1] Waymell *v.* Reed, 26th May 1794, 5 T. R. 599.—[2] B. C. i. 307.—[3] Ibid. 303-6.—[4] 12 Anne, c. 16.—[5] 5 & 6 Wm. IV. c. 41, § 1.—[6] Ibid. § 2.—[7] Gray *v.* Fowler, 1 Hen. Bl. 462.—[8] 1621, c. 28.—[9] B. C. i. 309.

volved the discount of a bill for three years the transaction was held vitiated.[1] It is usury to give, in discounting a bill, paper which has a period to run, without making allowance for that period,[2] unless the paper be given for the accommodation of the party, and the difference be but a fair remuneration for the banker's trouble.[3] Bankers are entitled to charge commission, but to what exact proportional amount seems not to have been decided.[4] Where the excess over the charge of five per cent. is the consideration for a risk incurred, the transaction is not usurious. It was so decided where £200 was advanced on the condition of the receiver paying the advancer £100 in half a year if both were alive; £100 in the next half-year if both were then alive; and £100 at the expiration of the next half-year if both were alive.[5]

By the suspension acts the following transactions are exempt from the usury laws. Charges or discounts on bills or notes at less than twelve months' date, or not having twelve months to run, and contracts for the loan or forbearance of any sum exceeding £10 not heritably secured.[6] The act does not admit of more than 5 per cent. being charged, unless by special agreement.[7]

CHAPTER II.

SOLEMNITIES OF WRITTEN OBLIGATIONS.

SECT. 1.—*General Explanations.*

WRITTEN instruments bearing on their face all the formalities which the law lays down as applicable to their purpose are presumed to be valid, and any ground for their being not so must be proved by the person impugning them. In transactions as to the sale of land and shipping (*see above*, pp. 51, 64) writing is necessary for the constitution of the contract. Where writing is so used, or where, in other cases, it is employed as evidence, it requires certain formalities to make it probative; these are dispensed with in certain deeds arising from commercial transactions, called privileged, and are modified in those which are entirely in the handwriting of the

---

[1] Marsh *v.* Martindale, 3 Bos. and Pull. 154.—[2] Matthews *v.* Griffiths, Peake, K. B. 200.—[3] Hammet *v.* Yea, 1 Bos. and Pull. C. P. 144.—[4] B. C. i. 310.—[5] Flight *v.* Chaplin, 1831, 2 Barn. and Adol. 112.—[6] 2 & 3 Vict. c. 37 § 1; continued by subsequent statutes.—[7] Ibid. § 2.

granter, and are termed holograph. (*See* p. 139.) Deeds prepared abroad will be effectual in this country, if they have received the proper formalities of the country in which they are prepared, except they concern heritage, in which case they must be in conformity with the established forms in this country.[1]

As the formalities of deeds are used for the purpose not only of preventing forgery, but of making consent an act of deliberation, imperfections in the statutory solemnities about to be described cannot be supplied by the granter acknowledging his subscription, nor by the evidence of witnesses.[2] The deeds are then but parts of incompleted contracts, which can only be enforced if homologation or *rei interventus* have interposed. (*See above*, p. 127.)

SECT. 2.—*Granter's Name and Subscription.*

The parties must not only be named, but so designated that they may be distinguished from others bearing the same names.[3] Where the granter can do so, he should subscribe with his ordinary signature, giving (unless in the case of a peer or peeress, or the eldest son of a peer enjoying a title by courtesy) the surname at length, and the christened name at full, or abbreviated.[4] Though the party from blindness or any similar cause should be unable to read the writing he subscribes, his signature, if he is in the habit of writing it, is the proper method of adhibiting his consent.[5] There have been several decisions on the validity of subscriptions by initials, and the rule that may be derived from them appears to be, that such subscriptions are valid, but that they require to be supported by the testimony of the witnesses if they be alive and accessible; and if they be not, that it must be shown that it was usual for the party so to subscribe.[6] A subscription by mark has no effect in a solemn deed.[7] It is very unsafe to give a party any kind of assistance in signing his name, and though it is sometimes necessary to give pretty minute directions as to the place of signing, the portion of the name requisite, &c., if these go so far as to take from the signature the character of the free and voluntary act of one who knows what he is doing, the deed will be reducible. This was the case where the hand had been led, and

---

[1] E. iii. 2, 39, 40.—[2] Park *v.* M'Kenzie, 29th November 1764, M. 8449. M'Farlane *v.* Grieve, 22d May 1790, M. 8459.—[3] Tait on E. 56.—[4] 1579, c. 80, B. T. D. 150.—[5] Duff *v.* Fife, 17th July 1823. App. 1 Sh. 498.—[6] Tait on E. 67.—[7] Bell on the Testing of Deeds, 160.

where the letters had been traced on the paper with a pin; and it had no slight effect on these decisions, that subscriptions by such means could never be capable of recognition as the handwriting of the party.[1]

A deed not signed at the end of the last page would probably be of no effect. Where it consists of only one sheet, a signature at the end will be of itself sufficient, but a document consisting of more than one sheet must have a signature to each, otherwise the sheets unsigned are not probative, a circumstance which will be in the general case fatal to the deed. The common practice is to sign each page, and where any one in a sheet of which some other page is subscribed is omitted, it must appear to be from accident, not the granter's unwillingness to sign.[2] Marginal notes must be signed by writing the christian name or the initials of it above, and the surname or the initials of it below.[3] A deed subscribed by one who did not know its contents may be reduced, and it is therefore generally necessary that a deed before subscription should be read by the party, or in his presence. A deed which had not been read by or to the party was reduced, though prepared in terms of a model prescribed by him.[4] It is presumed that the person who signs a deed has had such means of becoming acquainted with its contents, and the reverse requires to be proved by the party impugning it.[5]

Notaries.—Where the party is unable to subscribe, the deed may be executed by the subscription of two notaries authorized by him, in presence of four witnesses.[6] The practice is for the party to declare that he cannot write, and then touch the pen of each notary in token of authority to subscribe for him, the witnesses seeing the authority given, and the transaction being recorded in the notaries' doquet.[7] The rule as to the party's being acquainted with the deed applies as in the case of his giving his own subscription.[8] Deeds thus formally signed by notaries have the same legal presumption in their favour which belongs to other solemn writs.[9] Deeds affecting moveable property under £100 scots (£8, 6s. 8d.) may be subscribed by one notary in presence of two witnesses. When it is for money, though the sum should exceed £100 scots, if the creditor restrict his claim to that amount, such a deed is valid.[10] (*As to Wills, see above*, p. 107.)

[1] B. T. D. 160. Tait on E. 70.—[2] 1696, c. 15. Tait on E. 71-74.—[3] Tait on E. 74.—[4] B. T. D. 139.—[5] Duff, &c. *ut supra*.—[6] 1579, c. 80. E. iii. 2, 9.—[7] B. T. D. 172, *et seq.*—[8] Ibid. 76.—[9] Ibid.—[10] E. iii. 2, 10.

SECT. 3.— *Witnesses.*

Every deed subscribed by the party must be signed by two testamentary witnesses on the last page, each putting the word "witness" after his name. It is provided by statute "that no witness shall subscribe as witness to any party's subscription, unless he then knew that party, and saw him subscribe, or saw or heard him give warrand to a nottar or notars to subscribe for him, and in evidence thereof touch the nottar's pen, or that the party did, at the time of the witness's subscribing, acknowledge his subscription, otherwise the said witness shall be repute and punished as accessory to forgery."[1] It does not necessarily follow from the act, that where any of these solemnities is omitted the deed is null. Where, however, the witnesses have not seen the party subscribe, or heard him acknowledge his subscription, or (in the case of notaries) seen the authority given, they cannot be said to have attested the deed, and it may be reduced.[2] It is difficult to define how far the witness ought to "know the party." Cases have occurred in which ignorance was fatal to the deed.[3] It is quite usual, however, for individuals to be called to attest the deeds of persons they have never seen before, and nothing farther would certainly be required than such information as convinces one in the ordinary business of life that a man is the person he professes to be.

No other witnesses can support a deed but those who sign it. It was long questioned whether such witnesses could be examined on questions affecting the formality of their proceedings, as their verbal statements might tend to contradict what they have solemnly attested by their signature. It was at last decided that they might be adduced, but the import of the cases has generally been, 1*st*, That where the circumstances are such that the necessary solemnities must be presumed to have taken place, the witness will not be allowed to say that they had not; thus he will not be allowed to say he did not see the party subscribe, if he was present during the time of subscription; and, 2*d*, That the mere want of recollection on the part of the witnesses will not outweigh their written testimony that the requisite formalities were complied with.[4]

---

[1] 1681, c. 5.—[2] B. T. D. 281. Tait on E. 88.—[3] B. T. D. 277, *et seq.*—[4] Ibid. 233-273. Cleland *v.* Cleland, 6th June 1837.

Who may be Witnesses.—Boys under fourteen years of age and females cannot be instrumentary witnesses.[1] A deed signed by notaries was reduced because one of the witnesses was a blind man, and it is probable that the same rule would apply to a deed signed by the granter.[2] It was a general principle of our old law that individuals could not be witnesses to instruments in which they were personally interested.[3] This rule has been subject to modification. A deed was found validly attested, though a clock was left to one of the instrumentary witnesses, and £5 to each to buy mournings, these being viewed merely as "trifling marks of respect" when compared with the other objects of the deed.[4] It would appear, however, that an instrumentary witness cannot support by his evidence that portion of a deed which is in his own favour, and it may in some cases be necessary for such a witness to resign his interest before his testimony can be received in support of the deed.[5] Badness of character can be no objection to an instrumentary witness, but it is a subject of doubt whether or not conviction for an infamous crime, such as forgery or perjury, would disqualify.[6] The old exclusions in the law as to verbal testimony have been materially removed in the progress of later legislation.

All witnesses who can attest, can afterwards, if the deed be questioned, prove the formality of their attestation in a court of justice, by declaring that they saw the party subscribe or heard him acknowledge his subscription, and that they knew him to be the person he professed to be; but in all extrinsic questions on the circumstances under which a deed is granted, such as whether it was granted on deathbed, whether the granter was of sound mind, &c., the witnesses are liable to all objections arising from interest or otherwise, and where they can be avoided care should be taken not to choose persons liable to such objections.[7] Relationship does not now disqualify a witness.[8]

SECT. 4.—*Testing Clause.*

The testing clause is generally added by the writer of the deed as soon as possible after it has been signed. It states that the granter has signed the deed before certain witnesses, gives the names and designations of these witnesses, and of

---

[1] E. iv. 2, 27. Tait on E. 84.—[2] Cuningham *v.* Spence, 2d July 1824.—[3] E. iv. 2, 27. B. T. D. 99.—[4] Ingram *v.* Steinson, 22d January 1801. M. Ap. Writ. No. 2.—[5] Tait on E. 85.—[6] B. T. D. 100. Tait on E. 85.—[7] B. T. D. 102.—[8] 3 & 4 Vict. c. 59.

the writer of the deed, states the number of pages of which it consists, notifies the place and time of executing it, and describes any corrections or marginal notes.* The witnesses must be named and designed under the pain of nullity.[1] A material discrepancy between the name inserted and the name subscribed will be fatal to the deed, as, where "*Robert* Farquharson" who signed as witness, was called "*John* Farquharson" in the testing clause,[2] and "*Francis* Wars" was called "*Thomas* Wars."[3] It was in these cases no defence that there could not be a mistake about the person meant; it was sufficient that the witness signing was evidently not the person designed in the testing clause in terms of the act. Where a witness who signed his name "Hill" was designed by his sobriquet "Hillock," the deed was on the same principle ineffectual.[4] On later occasions, however, the rule has been freely interpreted where it could be maintained that the name is not a different one, but an erroneous spelling of the same one, as where "*Moor*" was inserted instead of "*Moir*," and "*Garvoch*" instead of "*Garrock*."[5]

As to the designations of the witnesses it would appear that if they can be shown to be correct they will protect the deed from nullity, however vague they may be.[6] Where by grammatical construction the designation can apply to both the witnesses, the principle has been to admit that it does so. Thus "A and B in Inverasragan" was held a good designation,[7] but not A and B "servitor to the Laird of Cavers," though both were his servants.[8] The designation of the writer of the deed is subject to similar rules.[9]

The insertion of the place and date of execution are not statutory requisites; but though the deed will therefore not be null from the want of them, these are circumstances of evidence so important that, at all events in suspicious cases, their absence will weigh strongly against its validity,[10] and

* *Form of a Testing Clause.*—In witness whereof, I have subscribed these presents, written on this and the preceding pages of stamped paper, by A. B., writer in Edinburgh [writer also of the marginal note on the page hereof, subscribed by me], in presence of these witnesses, C. D. and E. F., writers in Edinburgh, [witnesses also to my subscribing the marginal note aforesaid], at Edinburgh, the thirtieth day of May, one thousand eight hundred and thirty-nine years. A. B.
C. D., witness.
E. F., witness.

[1] 1681, c. 5.—[2] Abercromby *v.* Innes, 15th July 1707, M. 17022.—[3] Douglas, Heron, and Company *v.* Clerk, 28th November 1787, M. 16908.—[4] Archibalds *v.* Marshall, 17th November 1787, M. 16907.—[5] Stewart *v.* Stewart, 2d March 1815.—[6] Grant *v.* Keir, 29th November 1698, M. 16913.—[7] Wallace *v.* Campbell, 13th July 1749, M. 16900.—[8] Halden *v.* Kerr, 9th November 1714, M. 16924.—[9] 1681, c. 5.—[10] B. T. D. 76. Tait on E. 101.

it has to be observed that, in competition with other rights, undated deeds are always presumed to have been granted at a time unfavourable to the claimant. The testing clause need not be written by the writer of the deed, but if it is added by another person his name and designation should be given.[1] It has been decided, however, that the absence of these is not a statutory nullity.[2] The clause may be added at any time and by any person; a deed was sustained where it was not filled up till thirty years after the execution.[3]

SECT. 5.—*Holograph Writings.*

A holograph deed is one of which the whole or all the material part is written by the granter himself; and in consideration of the difficulty of forging such documents they are valid without being attested by witnesses.[4] They have not, however, all the privileges of regularly attested deeds. The latter are presumed to be genuine until they are proved to be false, but if unattested holograph deeds are challenged they must be supported by testimony or a comparison of handwriting.[5] It is maintained that the necessity of this may be avoided by a narrative, in the body of the deed, that it is in the handwriting of the granter—a statement which every regular holograph ought to have;[6] and in a late case it seems to have been held that the statement in a deed that it is holograph gives it the benefit of a presumption that it is so, throwing on the impugner the burden of proving that it is not. The statement however affords no presumption that words written on erasure are holograph.[7] A granter of a deed has frequently strong motives for giving it a wrong date; and as it is obvious that the unquestioned admission of unattested holograph deeds would give every opportunity for such misrepresentations, such a deed does not prove its own date, if it is any one's interest to deny it.[8] The date is in such circumstances held as unwritten, and the deed will be presumed to have been executed at the period which circumstances may point out.[9] If the granter is proved to have been insane after the date of a deed holograph and unattested, there is no presumption that he was insane when he executed it, but at the same time the party founding on it must show by circumstances that its date is supported.[10] Where

[1] Tait on E. 102.—[2] Andrews *v.* Sawer, 2d March 1836.—[3] Blair *v.* Galloway, 15th Nov. 1827.—[4] E. iii. 2, 22.—[5] Tait on E. 105.—[6] E. iii. 2, 22.—[7] Robertson *v.* Ogilvie's Trustees, 20th December 1844.—[8] E. iii. 2, 22.—[9] Tait on E. 108.—[10] Waddell *v.* Waddell's Trustees, 16th May, 1845.

there is any suspicion of fraud, strong evidence will be required to counteract it. Holograph obligations make no faith after twenty years, but the holder may, after the lapse of that period, refer the authenticity of the deed to the debtor's oath.[1]

SECT. 6.—*Privileged Writings.*

Wills or testaments are so far favoured that when they are clearly the deed of him whose name they bear, and are intelligible, the absence of some of the above described formalities will not be fatal to them. (*See above*, p. 107.)

Commercial Documents, or those used in the course of mercantile transactions, where facility and despatch are often of more importance than the security arising from complicated forms, are privileged so far that they may bear faith without being either holograph or attested.[2] The most important of these documents are Bills of exchange, Promissory notes, and Checks on bankers. The privilege also applies to "orders for goods; mandates and procurations; guaranties; offers and acceptances to sell or to buy wares and merchandise, or to transport them from place to place; and, in general, all the variety of engagements, or mandates, or acknowledgments, which the infinite occasions of trade may require."[3] Deeds, however, of a similar nature to those used in commerce, if applied to transactions of a different class, are not privileged, as in missives of sale of heritable property, a lease, or the discharge of a legacy.[4] It has been doubted how far a letter of guarantie for the amount of past loans or furnishings is privileged,[5] as it is not properly speaking a deed undertaken in the hurry of commerce, but "a transaction which one has ample time to reduce into a regular deed, and which he should be cautioned by the requisite solemnities not to enter into rashly;" but it has been held that a guarantie for past and future furnishings is privileged.[6] Fitted accounts, with a signed doquet, are privileged, and therefore binding, though neither tested nor holograph, provided they concern transactions strictly commercial.[7] The privilege is likewise said to apply to "settlements of account between a law-agent and his client for

---

[1] 1669, c. 9.—[2] E. iii. 2, 24.—[3] B. C. i. 325.—[4] Park *v.* M'Kenzie, 29th November 1764, M. 8449. Muir *v.* Wallace, 16th February 1770, M. 8457. Grierson *v.* King, 4th July 1781, M. 17054.—[5] Johnston *v.* Grant, 28th February 1844.—[6] Paterson *v.* Wright, 31st January 1810.—[7] E. iii. 2, 24.

ordinary business, which it is not usual to subscribe in the presence of witnesses."[1] Merchants' account-books are evidence against themselves. Loose accounts or jottings are not in the general case evidence against the writer; but they may be so if circumstances show distinctly that they refer to finished transactions. Discharges of rent to tenants are privileged, requiring neither to be holograph nor attested.[2]

SECT. 7.—*Stamps.*

In the several cases for which the stamp acts have provided* that writings shall be stamped, they cannot be used in evidence for the benefit of the parties in whose favour they bear to be conceived, unless they be duly stamped.[3] Besides the specific contracts enumerated in the schedules of the stamp acts, all agreements which admit of pecuniary calculation, and the subject matter of which exceeds £20, are liable to be stamped.[4] The following are exempt: memorandum or agreement for granting a tack at rack-rent, under the yearly rent of £5; memorandum or agreement for the hire of any labourer, artificer, or menial servant; "memorandum, letter, or agreement, made for or relating to the sale of any goods, ware, or merchandise;" agreement between the master and mariners of any vessel trading coastwise, and "letters containing any agreement in respect of any merchandise, or evidence of such an agreement," passing by post between merchants distant fifty miles from each other.[5] The exemption as to sale of merchandise will not apply to that which may become merchandise, but is not so in its present state, as growing crops, timber, &c.[6] It has been held to apply to an agreement by a broker to indemnify his principal on the re-sale of goods purchased by him; to a guarantie for the price of goods; and to an agreement to share in goods purchased, though thus constituting a partnership in respect of the transaction.[7] Deeds relating to sequestrated estates are exempt,[8] and there are exemptions in favour of savings banks.[9]

---

[1] Tait on E. 123.—[2] Ibid. 123-125.—* The chief stamp acts are 23 Geo. III. c. 49 & 58; 31 Geo. III. c. 25; 32 Geo. III. c. 51; 35 Geo. III. c. 55; 37 Geo. III. c. 111 & 136; 43 Geo. III. c. 126 & 127; 44 Geo. III. c. 98; 48 Geo. III. c. 149; 55 Geo. III. c. 184; 5 Geo. IV. c. 41; 6 Geo. IV. c. 41; 9 Geo. IV. c. 13, 23, and 49; 3 & 4 Wm. IV. c. 23; 5 & 6 Vict. c. 79; and 7 & 8 Vict. c. 21.—[3] 37 Geo. III. c. 19, § 3, &c. 111, § 7. M'Niven *v.* Hunter, 10th March 1836.—[4] 55 Geo. III. c. 184, Sch. Agreement.—[5] Ibid.—[6] Coventry on Stamps, 181.—[7] Ch. on St. 180.—[8] 2 & 3 Vict. c. 41, § 145.—[9] 9 Geo. IV. c. 92, § 41.

Every ordinary pecuniary obligation requires to be stamped as a bill or otherwise; but a mere acknowledgment by one that money has been deposited in his hands, such as "Mr T. has left in my hands £200;" "I have in my hands three bills which amount to £120, 10s. 6d., which I have to get discounted, or return on demand," need not be stamped.[1] In calculating the amount of the subject-matter of the agreement, the extent of the immediate engagement is viewed, not that of any more extended responsibility which may incidentally arise in consequence of it. Thus, where a carrier gave the following memorandum, "received of L. & Co. a paper parcel directed to Messrs A. B. & Co., value £260, which we agree to deliver to them to-morrow, fire and robbery excepted, carriage paid here," a stamp was not necessary in an action for loss of the parcel, the price of carriage, which was the subject-matter of the agreement, being less than £20.[2] "An agreement by several persons for a subscription to one common fund, or for one common purpose, in which each is interested though not jointly, and although several as to each, requires only one stamp."[3] The stamp-acts are strictly interpreted, and no documents are held to require stamp but those which are distinctly included in the schedules, &c. Thus, an indorsement on an account, "Pay the within account to A. B." being a mere direction to pay a debt otherwise existing to a particular person, was held not to require a stamp.[4]

It has been found that where the second leaf of a stamped sheet had been removed, and a half-sheet of unstamped paper substituted for it, the deed was not to be considered as properly stamped. The stamp was of course on the first half-sheet, and it was to the requisite amount, so that the full duty to government had been paid. It seemed to be held however that if any part of it be on a piece of paper which does not bear a stamp, the document is not to be considered as stamped.[5]

Effects of want of Stamp.—By certain old acts, a penalty of £5 is payable for every unstamped writing, for which there is not a particular penalty in the other stamp-acts.[6] Agreements and minutes liable to a general stamp formerly of £1, now of 2s. 6d. may be stamped on payment of the duty merely, within 14 days after being signed; on payment of the duty and £10 after the lapse of that time.[7] That a writing has

[1] Cases quoted Ch. on St. 166.—[2] Latham *v.* Rutley, 1824, 1 R. & M. 13. —[3] Ch. on St. 178.—[4] Laurie *v.* Ogelvy, 6th February 1810.—[5] Nicol *v.* Fraser, 11th March 1841.—[6] 5 & 6 Wm. & M. c. 21, § 11. 6 & 7 Wm. III. c. 12, § 7.—[7] 7 & 8 Vict. c. 21, § 5.

been engrossed on a stamp, if it be not executed, is no obstacle to another writing being engrossed on it and executed, with a narrative in the testing clause that the previous writing is held as erased.[1] The penalty for an unstamped receipt is £10, if the sum be under £100, and £20 if above that amount.[2] In the general case the proper stamp may be adhibited by the commissioners at any time before the document is used in evidence, on payment of the stamp-duty and the statutory penalty.[3] The commissioners are prohibited from stamping bills, notes, proxies to vote at meetings of joint-stock companies, and receipts, after they have been extended;[4] except that receipts may be stamped within fourteen days, on payment of the duty and £5, and within a calendar month, on payment of the duty and £10.[5] Such deeds then, if unstamped, are ineffectual from the beginning, and cannot be validated.[6] An apprentice indenture, which does not state the true sum paid as apprentice-fee, is in the same situation.[7] The prohibition extended to policies of insurance on sea risks, but it may be inferred, though it is doubtful, that the above rule as to agreements applies to them.[8] Documents with stamps of inferior value are generally in the same position with those unstamped; but where the stamp is of the assigned or of a higher value, though of different denomination, there are generally provisions for substituting the proper stamp at a smaller sacrifice. An unstamped deed not being receivable as evidence by any court of justice, the deficiency cannot be overcome as in the case of an ordinary informality, by homologation or *rei interventus*.[9] (*See above*, p. 127.) It appears however that a document may be judicially used for a purpose different from that for which it requires to be stamped,—as where a revocation of a settlement was adduced with other evidence to prove fraud and circumvention.[10] In those cases where a document may be stamped after it is executed, if the stamp be adhibited before judgment is given in a court of law, it will retroact and validate the proceedings.[11] It has even been held that a subsequent stamping of a writing validated diligence which had proceeded on it before it was rightly stamped.[12] The expense of stamping a document in the

[1] Longmore v Lindsay, 19th July 1845.—[2] 35 Geo. III. c. 55, § 8.—[3] Ch. on St. 88, Coventry, 26.—[4] 31 Geo. III. c. 25, § 19. 7 & 8 Vict. c. 21, § 7.—[5] 35 Geo. III. c. 55, § 11.—[6] Scott v. Burd, 19th November 1845.—[7] 8 Anne, c. 9, § 39.—[8] 35 Geo. III. c. 64, § 14; 7 & 8 Vict. c. 21, § 5.—[9] Tait on E. 155.—[10] Mackenzie v. Crawfurd, 25th June 1839.—[11] Davidson v. Gibb, 13th Nov. 1838. Wood v. Ker, 13th Nov. 1838. Church v. Sharpe, 8th March 1843.—[12] King v. Baillie, 18th December 1844.

course of a process was laid on a party, the granter of the document, on the ground that he should have granted it in a valid form, and should have implemented it without an action.[1] A contract may be proved by separate evidence (if it be one of those which do not require writing), if invalid from want of stamp; but it is held in England that if it come out in evidence that there has been an agreement committed to writing, it must be produced duly stamped, otherwise the contract cannot be enforced.[2]

Colonial deeds must bear their proper stamps (if there be any) before being received as evidence in this country;[3] but it is held (at least in England) that the British courts cannot recognise the stamp or other revenue laws of foreign countries.[4]

The stamp laws as they more particularly affect Bills and Notes will be again considered under that head.

SECT. 8.—*Delivery.*

It is a general rule that a deed is not binding on the granter until it is delivered into the hands of the person favoured; but, 1*st*, There are some deeds which do not require delivery; 2*d*, There are acts which are equivalent to delivery; and, 3*d*, There are cases in which the granter is the proper custodier of the document for behoof of the person favoured. Testamentary deeds do not require delivery, for they are not to take effect till after the granter's death, and are revocable while he lives, even though delivered.[5] Deeds containing a clause dispensing with delivery are effectual if found in the repositories of the granter after his death.[6] Where the granter has an interest in the deed (as in the case of a Disposition reserving his liferent) delivery will be dispensed with, for he will be presumed to have kept it for the security of his own interest.[7] A deed which one is under an obligation to grant requires no delivery to make it effectual.[8]

Where delivery is requisite, it may be made in the hands of a third party, but to make such delivery effectual, the act must have been done intentionally for behoof of the person favoured.[9] If a deed is produced by a third party, the presumption in the absence of evidence is that it has been lodged

---

[1] Gardiner's Executrix *v.* Bennett, 28th Nov. 1839.—[2] Ch. on St. 68.—[3] Ibid. 15.—[4] James *v.* Catherwood, 3d June 1823; 3 Dowl. & Ryl. 190.—[5] E. iii. 2, 44. Tait on E. 157.—[6] Ibid.—[7] Ibid.—[8] Cormack *v.* Anderson, 8th July 1829.—[9] Tait on E. 161.

with him for behoof of the person favoured, but if the third party be the granter's law-agent, the deed has no more effect than it would have if found in his own repositories.[1] When it is delivered to a person who is agent both for the granter and grantee, it will be a question of circumstances for whose behoof it was delivered.[2] Gratuitous deeds, such as deeds of provision to children, though held as delivered in the hands of third parties, are still in the ordinary case revocable by the granter. But it is otherwise if the third party be the natural custodier of the deeds of the person favoured, *e. g.* a parent or guardian.[3] If the person in whose hands a deed is placed is favoured by it, and it is held as delivered to him for his own behoof, he is likewise the depositary of it for the behoof of all others interested.[4] Entry of a deed in any public register is held equivalent to the most complete delivery to the party.[5] The date of delivery of deeds of provision to children is often of importance in questions with creditors. It has been recommended that, to make it clear that they are not latent, and to preserve their preference, they should be recorded, or delivered before witnesses; otherwise, whether in the repositories of the parent or of the child, they are presumed not to have been delivered at such a time as will make them effectual against creditors.[6] All latent deeds to near relations, to the injury of creditors, are reducible on the ground of fraud, and the creditors do not require to show that the granter of the deed was insolvent at the time. An undelivered deed must always be held latent, and if the person favoured be a son or other near relative living with the granter, it may be questioned if any effectual delivery can be made. Though registration has been recommended, it is not quite clear that it will in all cases take the document out of the latency.[7]

---

[1] Tait on E. 164.—[2] Maiklem *v.* M'Gruthar, 29th March 1842.—[3] E. iii. 2, 43. Tait on E. 166.—[4] Tait on E. 167. Riddell *v.* Inglis, M. 11577.—[5] E. iii. 2, 44.—[6] Tait on E. 171.—[7] See the Law of Bankruptcy, 117, *et seq.*

PART V.

THE CONTRACT OF SALE.

CHAPTER I.

General Rules applicable to the Contract.

Sect. 1.—*How constituted.*

Sale is a contract by which one party engages to transfer property of which he is possessed to another party, in consideration of receiving money of the current coin of the realm, or some security which may be converted into money (such as bank-notes or bills of exchange) in return. The contract is completed by the consent of the parties, buyer and seller, when they are at one as to the subject, the price, and the conditions. In England, by the statute of frauds, no sale for a consideration of £10 or upwards is good unless there have been a complete or partial delivery or payment, or a note made of the transaction and signed by the parties or their agents.[1] In Scotland, however, verbal consent will, in the general case, suffice to constitute the contract, except in sales of land and ships, for which writing is necessary.* The general method of completing the contract is by offer on the one part, and acceptance on the other without undue delay.

Broker.—By commercial practice, the contract may be made on both sides by a broker, a person whose profession it is, by the consent of parties, to conduct sales and settle the terms of the bargains. When such a person has been authorized by one party to buy, and by another to sell, he completes the transaction so as to protect it from the statute of frauds in England, and to make it a completed contract in Scotland, by making an entry of the transaction in his books, and giving each party a note of it, called a *bought* and *sold note*.[2]

---

[1] 29 C. II. c. 3, § 17, 9 Geo. IV. c. 14.—* See p. 124, *et seq.*—[2] B. C. i. 435, M. on V. & P. 76.

Agent.—Consent may likewise be given on either side through an authorized agent. If the capacity in which such a person acts is not known to the party with whom he is dealing, or if he assumes the aspect of a principal, he is by common law personally liable.[1] By two statutes, rules have been laid down for determining the respective responsibilities of the employers of agents, the agents themselves, and the other parties dealing with them, known as the Factors' Acts.[2] They will be more specially considered under the head of Principal and Agent.* An agent cannot lawfully purchase the property he is employed to sell, nor, when employed to purchase, can he be himself the vendor.[3]

Parties.—There must be no misunderstanding as to the parties to the contract, otherwise the person acting under the mistake may withdraw. Thus, where a seller treats with a man in insolvent circumstances, in the understanding that he acts as agent for another person, but finds that he has been acting for himself, he will be entitled to give up the bargain.[4]

Subject.—The subject must be specific, and individualized or set apart from others, before sale has actually taken place; but to constitute the *contract*, it is only necessary that there should be some criterion by which the subject is to be ascertained. Thus, when a person sees a flock of sheep in a field, he may bargain for a certain number, though these are not picked out; here the number settled on between the parties is the criterion. He may bargain for the whole flock without counting them; here the number in the field at the time is the criterion.[5] The parties must be at one as to the nature of the subject, or else as to the rule by which any quality of it not ascertained at the time is to be judged; and ambiguity will render void the contract. Thus, a person had agreed to purchase about 300 quarters more or less of rye, to be brought from Hamburg. The seller brought and offered 350, which the purchaser refused, as too great an excess. The seller refused to deliver less. The purchaser was found not bound to take the commodity.[6]

Price.—The price must be a real and serious one, and not merely nominal. Where the buyer is discharged from paying the price, there is no sale, and the other party does not incur the obligations noticed below as incurred by the vendor.[7] The amount must be ascertained, or capable of being

---

[1] Lang *v.* M'Leod, 15th January 1830.—[2] 6 Geo. IV. c. 94. 5 & 6 Vict. c. 39.—* See Part IX. Chap. III. Sect. 4.—[3] Br. on S. 185.—[4] N. H. L.—[5] Ibid.—[6] Cross *v.* Eglin, 1831. 2 Barn. & Ad. 106.—[7] Br. on S. 147.

ascertained by some criterion, such as the fiar price of grain, the market price, the decision of an arbiter, &c.[1] It was decided in an old case that the price might be left to be ascertained by the buyer,[2] but it is questionable whether a reference to either party can be justly binding on the other,[3] and Erskine thinks that such a stipulation should be subject to the modification of a judge.[4] In some cases where no price or criterion for deciding it by is named, the market price will be presumed to have been in the view of the parties. There is a peculiar kind of sale, by which the seller engages to dispose of his property while both price and buyer are unknown, but are to be fixed by certain contingencies, viz. sale by auction. (*See below*, p. 156.)

SECT. 2.—*Obligations on the Seller.*

The seller is bound to deliver the goods, but not till he is offered the price, unless credit has been stipulated for. He may retain them if there is danger of losing the price by the purchaser's insolvency, and may even stop them on their passage to the purchaser. (*See below*, p. 164.) The seller is bound in the custody and delivery of the commodity purchased, to use all proper measures for its safety; and if he put a piece of goods into the hands of a carrier, shipmaster, &c. it should be so fixed on him as to give the buyer a remedy against him, in case of the property being lost.[5] The directions given by the buyer as to the means of conveyance must be followed with reasonable diligence and attention, and the seller will be responsible for the consequence of departing from them.[6] Where the goods are to be sent by sea, it will be part of the duty of the seller to send the buyer such information as will enable him to insure.[7] This is generally done by transmitting a bill of lading.

Deficiencies.—If a particular subject have been sold, which has been described by a certain measurement, and the purchaser afterwards find that this measurement is inaccurate, the bargain in the general case will not be held as null, provided there is no fraud or complete misunderstanding as to the nature of the subject; nor will even an abatement of the price be awarded.[8] Instances of this description have

---

[1] Br. on S. 148. E. iii. 3, 4.—[2] Montrose *v.* Scot, 13th March 1639, M. 14155.—[3] N. H. L.—[4] E. iii. 3, 4.—[5] B. C. i. 444. Br. on S. 370.—[6] B. C. i. 445. Br. on S. 368.—[7] Br. on S. 373.—[8] N. H. L. Hannay *v.* Bargaly's Crs. 26th January 1785, M. 13334.

generally taken place in sales of lands, which have been described in advertisements, &c., as containing so many acres, and on measurement after purchase are found not to contain so many. In those cases where the error is material, the court, using its equitable power, has allowed the purchaser to throw up the bargain.[1] The principle of no abatement proceeds on the supposition of there being no doubt that the buyer has got the subject he wished to purchase, and that there is only an error in the description. On the other hand, if something is specified as part of the subject, which is found afterwards not to be so (as when the teinds are said to be sold along with the land, and it is found that they did not belong to the seller), then the buyer must get abatement, or may insist on being relieved from the contract.[2] On the principle of delivering the subject entire, the seller must purge any heritable encumbrances and debts, which are not excepted by the terms of the bargain.[3]

If the seller fail to put the purchaser in full and unquestioned possession of the subjects purchased, he is liable for the damage occasioned by his default. Unless there be special damage in the case, the pecuniary damage by non-delivery is generally estimated by the price of the goods at the time when delivery should have taken place.[4] This, however, is not an absolute rule. The price at the time of delivery may not measure the buyer's loss by the transactions, for the price may be rapidly rising, and holders might be enabled to clear a large profit by preserving their stock. This was exemplified in a sale of Russia hemp. The price in the interval between the agreed on time of delivery and the decision in an action, had varied from £21, 12s. 6d. to £41. The purchaser demanded that the damages should be estimated at the highest selling price. The seller pleaded that they should be measured by the price at the time of delivery. The court found that there could be no fixed rule for such cases, and that it was for a jury to determine according to all the circumstances.[5] When the delivery is delayed beyond its due time, the buyer is relieved from his obligation to receive and pay for the subject of the purchase.[6]

Warrandice.—One of the obligations on the seller is to warrant the thing sold; 1*st*, As to his title to dispose of it;

---

[1] Br. on S. 316-322.—[2] Iv. Er. 647. B. on C. T. 168.—[3] Horne *v.* Kay, 28th May 1824. Paton *v.* Stuart, 11th March 1825.—[4] Startup *v.* Cortazzi, 1835. 2 Cer. Mees & R. 165.—[5] Watt *v.* Mitchell and Company, 4th July 1839.—[6] Robb *v.* Cruickshank, 29th May 1840.

and, 2*d*, As to its being serviceable of its kind. In moveables possession infers a title, but it is otherwise in landed property, where a complicated system of transference has been established, through which it is often extremely difficult to discover who may have the best title. This subject will be found discussed elsewhere.*

With regard to the second description of warrandice, it includes freedom from material latent defects; thus, a horse must be free of constitutional diseases or accidental defects, which tend to affect its life or utility, and even of inveterate bad habits, which render it either useless or dangerous. The animal must, in short, be sound,—a mere temporary injury or hurt, or a bad habit, which neither shows constitutional infirmity, nor renders the horse useless, is no breach of warranty.[1] If the subject is purchased for a specific purpose, it must be applicable to that purpose. Thus, if one agrees to purchase "a draught horse," and the seller gives him a saddle horse, the purchaser will not be obliged to keep it, however good it may be.[2] Where ale purchased for the West India market was not properly prepared to stand the heat of the climate, so that a great part of it was spoiled and lost, the purchaser was found not liable for the price.[3] "The law resolves itself into this, That if a man sells generally, he undertakes that the article sold shall be fit for some purpose: if he sell it for a particular purpose, he undertakes that it shall be fit for that particular purpose."[4] To entitle the buyer to resile, the defect must either be one which interferes with the principal purpose to which the subject is applicable, or with some peculiar purpose to serve which the purchaser has expressly bought it. Thus, one would not be allowed to return a horse purchased merely as a saddle horse, because it will not carry a female;[5] and where "good, sufficient, and marketable bear" [viz. barley] was sold, the buyer was not entitled to return it because it was unfit for malt.[6]

"Where the dealing is in a particular branch of trade, the parties are presumed to contract according to its customs; and therefore, if the custom be, to declare, at the time of sale, whether the goods be sea-damaged, in the absence of such declaration, a warranty will be implied, that they are not so. If the article were bespoke to answer a particular purpose,

---

* See above, p. 51, *et seq.*, and below, p. 168.—[1] M. on V. & P. 349, 357. Deuchars *v.* Shaw, 17th May 1833. Hendrie *v.* Stewart, 16th June 1842.—[2] N. H. L.—[3] Baird *v.* Pagan, 14th Dec. 1765. M. 14240.—[4] Best, C. J. 5 Bingh. 546.—[5] N. H. L.—[6] Seaton *v.* Carmichael, 28th Jan. 1680, M. 14234.

a warranty is implied that it will answer such purpose. And in every contract to furnish manufactured goods, a warranty is implied that they shall be of a merchantable quality. Nor will the law imply a warranty, where the parties have expressly contracted, as to the nature and quality of the thing to be sold; thus, though we have just seen, that if A contract with B for manufactured goods, the law will imply a warranty that they shall be merchantable; yet no such warranty can be implied if A purchase the goods by sample."[1]

In works of art questions of warranty are of difficult adjustment. When a picture is warranted the work of a particular master, it is very difficult to prove that it is not so; and though statements may have been made by the seller, it does not follow that they have been taken as warranties and relied on. In these cases, unless a distinct statement have been made which is not true, and the purchaser has relied on the statement, he has no redress.[2]

The seller is liable for the damage which may be occasioned to the purchaser's property by the defect of the subject, or its unfitness for its proper use. Thus, where a chain-cable, having a broken link, was slipped to avoid danger to the ship, and the anchor was lost, the purchaser was found entitled to recover the value both of the cable and the anchor.[3]

Apparent Defects.—Unless where he comes under a special warranty as to any particular quality in the subject, the seller is not liable for apparent defects. As to these the buyer is supposed to renounce his objection, and it is his own fault if he do not perceive them. In ordinary language, "his eye is his merchant."[4] Thus, a quantity of wheat was sold of crop 1799, which was not allowed to be returned as bad, because the grain of that crop was universally known to be of a bad quality, and particularly because the buyer knew that to be the case with the wheat in question.[5] Where one ordered a steam-engine boiler, with a general reference to another in the maker's hands, and during its progress having observed that it was longer than but not so broad as the pattern, said it would do, if the maker would take two feet off it, he was obliged to fulfil the bargain, although the maker did not tell him that this would diminish the power.[6]

---

[1] Smith's M. L. 464.—[2] M'Lellan *v.* Gibson, 22d March 1843.—[3] Borrodaile *v.* Brunton, 1818, 2 Moore, 582.—[4] Br. on S. 296. M. on V. & P. 345. Muil *v.* Gibb, 27th June 1840.—[5] Seton *v.* Wemyss, N. H. L.—[6] Kerr *v.* M'Dowall, 26th June 1828.

It was, at one time, held that a warranty might be inferred from the price paid, but this doctrine has been long discountenanced as a general rule.[1] It may receive a sanction, however, in the usage of trade, in paying a certain price for a certain quality of goods. Thus, where "well-cured herrings for exportation" were purchased at a price said to be the highest in the home-market for the best quality, the jury were told that the law implied a warranty of the best quality, unless they were satisfied from the evidence that when herrings were bought for exportation they were understood to be of an inferior quality.[2] When articles are sold under their market price, the tacit obligation of warrandice is not to be rigorously applied, particularly if the seller say the buyer must take his chance; but this does not extend to permitting the vendor to sell at a low price what is utterly useless, or to cheat by adulteration or otherwise.[3] Nor will an express warranty of the seller be relaxed, however cheap may be the subject.[4]

The buyer complaining of defects must show that they, or at least the proximate causes of them, existed at the time of sale.[5]. It was held that in the case of such a commodity as a steam-engine, the circumstance of its requiring an unusual amount of repairs immediately after it has been furnished is sufficient ground for its insufficiency being inferred, unless the maker can show that it has been unskilfully used, or has been injured by some accidental cause.[6] It was found that the existence of disease in a horse at the time of sale might be proved by dissection after death.[7] If the seller refuse to take back the subject of the sale when in terms of the bargain he is in law liable to do so, it remains at his risk.[8]

SECT. 3.—*Obligations on the Buyer.*

The principal obligation of the buyer is to pay the price, and in the ordinary case he cannot demand delivery until he is prepared to do so.[9] Delay to pay at the proper period founds a claim for interest;[10] but in the absence of express stipulation the time and manner of payment are regulated by custom.

---

[1] Smith's M. L. 465. M. on V. & P. 345.—[2] Whealler *v.* Methuen, 20th June 1843.—[3] N. H. L.—[4] Ibid.—[5] Br. on S. 297.—[6] Napier *v.* Campbell, 10th March 1841.—[7] Wright *v.* Blackwood, 14th June 1833.—[8] Graham *v.* Wilson, 25th January 1839.—[9] Br. on S. 343.—[10] E. iii. 3, 79. Br. on S. 348.

Credit.—Where credit is stipulated for, the purchaser can demand delivery before payment; but it is an obligation on his part that he shall be in a state of solvency. If he is not, the vendor having consented to give credit by the terms of the contract, cannot pursue for the money; but he may suspend the contract.[1] Where no credit is stipulated for, the purchaser may still be entitled to it by the usage of trade, if that usage was known to both parties at the time when the contract was entered on.[2]

The market price is the criterion of the price where none is stipulated, but long delay to object to the price, after the charge has been rendered, will deprive the buyer of the right to complain that the sum is above the market price.[3] The price ought to be in current money, but this general obligation may be affected by special stipulation. Thus the buyer may agree to give "a discountable bill," or "an approved bill," which means one that no reasonable objection can be stated to. Where the seller agrees to take bank-notes, or the bill of a third party not indorsed by the buyer, or if, for his own convenience, he prefers an indorsed bill to money, or agrees to run the risk of taking such a bill, he takes the chance of getting payment through the document.[4] Where the seller has got a bill from the buyer, and has lost it, he cannot demand cash, at all events he cannot do so without agreeing to indemnify the buyer for any claim which may be made on him, although the original bargain should have been for ready money.[5] If the seller has received a bill without objecting for some time, he will be barred from a claim for cash.[6]

Another obligation of the buyer is, to take delivery of the subject; and if he do not do so, he will not only be subject to the risk, but be liable to the seller for the expense occasioned by keeping it.[7]

Notice of Defect.—If the buyer intend to give up his purchase on the ground of any alleged defect, he must do so without undue delay. He cannot, after having intimated that he rejects the goods as unsound, take possession of part of them, without rendering himself liable to fulfilment of his own part of the contract.[8] Like most similar matters in mercantile law, the time within which notice of rejection

---

[1] M. on V. & P. 249.—[2] B. P. 100, 101.—[3] Mills *v.* Hamilton, 1st Dec. 1830.—[4] B. P. 106, 107, 127. M. on V. & P. 276.—[5] Br. on S. 389. M. on V. & P. 276.—[6] Arnot *v.* Watt, 12th May 1825.—[7] B. P. 128.—[8] Ransan *v.* Mitchell, 3d June 1845.

must be given is greatly regulated by the customs of trade. A person was not entitled to plead the unfitness of sowing seed which he had purchased in December 1818, and for which he had given bill in February 1819.[1] Much will depend on the time which the defect is likely to take in fully developing itself, in conjunction with the conduct of the purchaser. A horse having been worked for six weeks, and having been a few days in the hands of a third party, was found not returnable on the ground that it had spavin and was "a shiverer."[2] In England, a chandelier having been contracted for sufficient to light a room of given dimensions, which the buyer kept and used for six months, and then returned, he was held bound to pay for it though it was not according to the contract.[3] A person who was in doubt as to the sufficiency of an article purchased, was found to have lost his remedy by taking his chance of profit in allowing it to be put up for sale.[4] But the buyer may, it is said, return the goods which he has resold in the regular course of trade, if the second purchaser is justly discontented with them.[5] The keeper of a tavern was allowed to return a cargo of wine some months after he received it, because his customers complained of its being bad.[6] Damages were given for the price of herrings paid for by the original purchaser, a purchaser from *him* having refused them as not a proper marketable commodity.[7] It is held that "even where the delay has been such as to bar the purchaser from succeeding in his entire rejection of the goods, he may be allowed relief by abatement on making out a strong case of defect."[8] If the buyer is discontented, and the seller intimates his wish that the bargain shall be at an end, the buyer loses his right to insist on its fulfilment by delay in answering.[9]

SECT. 4.—*Conditional Sale.*

Conditions in the contract of sale are of two kinds, Resolutive and Suspensive. A contract of sale made under a condition of the former kind is as complete, in the mean time, as an unconditional contract, each party being entitled to call on the other for performance of his engagements. The purpose of the Resolutive Condition is to make the sale

---

[1] Bruce *v.* M'Kenzie, 21st June 1821.—[2] Pollock *v.* Macadam, 9th June 1840.—[3] Milner *v.* Tucker, 1st Dec. 1823. 1 Car. & Pay. 15.—[4] Parker *v.* Palmer, 1821. 4 Barn. & Ald. 387.—[5] N. H. L.—[6] Dunbreck *v.* Grant, 11th Dec. 1792. N. H. L.—[7] Whealler *v.* Methuen, 10th January 1843.—[8] B. C. i. 439.—[9] M'Niell *v.* Cameron, 21st Jan. 1830.

be dissolved, and the parties restored to their former position, if the condition is not fulfilled.[1] It is very questionable how far such a condition can operate in Scotland. The law of trade does not permit one to found a false credit by retaining, as his property, that which may be by a secret understanding vindicated as the property of another person. Whatever may be the effect then of such a condition as between the buyer and seller, it cannot affect third parties, such as the buyer's creditors, who would undoubtedly be entitled to goods which he had purchased under the condition that if not paid for at a certain time they should be restored to the seller.[2]

Suspensive.—In the case of a Suspensive Condition (or, as it is termed in England, a condition precedent), there is no good sale until the condition is accomplished.[3] The condition may be either as to the subject of the sale, or as to the price; a very common condition is, that the article shall give the buyer satisfaction. Two bullocks were sold at so much per stone of what they might weigh, provided the purchaser on seeing them was pleased with their appearance. He was *not* pleased, and the transaction was found to be no sale.[4] There may be conditions over which neither of the parties has any control, such as the arrival of a vessel.[5] Where goods are sold "on arrival" by a certain vessel, there is no sale if the vessel arrive without the goods.[6] Where tallow was purchased "on arrival," "if it should not arrive on or before the 31st December next, the bargain to be void," and the vessel was wrecked on the way, but the tallow was saved, and might have been otherwise forwarded by the 31st December, the sellers were not held liable by the bargain to undertake this additional trouble and expense.[7] A common condition as to the price is, that it shall be paid in ready money. If it is not paid when the goods arrive, there is no sale, unless the seller expressly or tacitly consent to an alteration, which he will do by not returning immediately a bill for the amount sent to him.[8] Where clover seeds were sold for acceptance of a draft at three months, and the draft was sent with the bill of lading, with a request that it would be returned "in course," and it was not returned by the next

---

[1] Br. on. S. 32.—[2] St. i. 14, 5. B. C. i. 239.—[3] Br. on S. 33.—[4] M'Bein v. Shaw, N. H. L.—[5] Br. on S. 38.—[6] Boyd v. Sifkin, 1809. 2 Camp. 326.—[7] Idle v. Thornton, 1812, 3 Camp. 273.—[8] Arnot v. Watt, 12th May 1825.

post after receipt, the sellers were held entitled to reland the goods and give up the bargain.[1]

Although a conditional sale is not completed until the fulfilment of the condition, the parties are bound to each other, and neither is entitled to do any thing which may affect the right of the other during the dependence of the condition. If either do so, he will be liable to damages for breach of the contract.[2]

Sale and Return.—The common commercial contract called Sale and Return, by which goods are committed by a wholesale dealer to a retailer, to be paid for at a certain rate if sold again by the latter, is a species of conditional sale. When the goods are kept beyond the time specified, or when none is specified if they are not returned within a reasonable time, the sale will be held absolute.[3] In this species of transaction goods are generally sent periodically, and the accounts between the parties settled at regular intervals.[4]

CHAPTER II.

Sale by Auction.

Sect. 1.—*Nature and Requisites.*

This is a process by which the possessor of a commodity comes under an engagement to the public to sell it to that person who will give for it the largest sum, or the largest excess over a certain "upset price." By the usual method in this country bidders compete against each other, each offering more than his predecessor until an offer is made which no one present is disposed to go beyond. By the method called "Dutch auction," the commodity is put up at a price beyond what is expected for it, which is gradually decreased, until it reaches that point which will induce some one present to purchase it, rather than incur the risk of its falling into the hands of another by a farther reduction. The auctioneer acts as agent for both parties, the vendor specially empowering him to sell, while the purchaser authorizes him by bidding. In England his note of the bidding in the cata-

[1] Brodie *v.* Todd & Co. 20th May 1814.—[2] Br. on S. 43.—[3] Ibid. 37.—[4] B. C. i. 270.

logue is considered a writing by an authorized agent binding on the parties in terms of the statute of frauds.[1] (*See above*, p. 146.) There is always a pre-arranged criterion that the bargain is concluded, viz. the fall of the hammer, the running of a sand-glass, the burning down of a taper, &c. Until thus foreclosed a bidder may retract his offer.[2]

License-duty.—The person who exposes property to sale by auction must, in the general case, be a licensed auctioneer. The annual license duty is £10.[3] No license is required by one selling goods sequestrated for nonpayment of rent to less amount than £20, or under the small-debt acts. There is also a general exemption applicable to all sales under orders of court where such an exemption has been set forth in the statute authorizing the sale.[4] It was formerly necessary for the auctioneer, in addition to his auction license, to take out a separate license for every excise licensable commodity he intended to sell, while a per centage was payable on all sales, but these duties were repealed by the 8 & 9 Vict. c. 15.

SECT. 2.—*Rights and Liabilities of Parties.*

The auctioneer's duty towards his employer is to obtain the highest price he can procure without fraud. If an upset price is fixed on by the seller, the auctioneer is liable for the consequences of departing from it, but he is not bound by secret instructions not to take less than a certain sum, as he could not act on them without fraud.[5]

Conditions and Articles.—In ordinary sales of moveable effects, it is usual to embody certain general conditions of sale, as to the risk of the articles, the payment of the price, &c., in the catalogues of the effects to be sold, or on placards exposed in the auction room; and there is no doubt that when they are distinctly set forth, and are made accessible to the general bidders, and do not contain any very unusual stipulations, they will be binding on the bidders. In sales of heritable property, in auctions of leases, the farming of taxes, &c., where the engagement undertaken in the sale-room is not completed by the simple operations of removing the articles and paying for them, it is usual to have regular Articles of Roup set forth as a stamped deed, which the highest bidder at all events, and sometimes the successive offerers must execute. It has been found that the express terms of

[1] M. on V. & P. 75.—[2] Ibid. 151.—[3] 8 & 9 Vict. c. 15, § 2.—[4] Ibid. § 5.—[5] M. on V. and P. 158.

such articles cannot be modified by the production of correspondence between the parties.[1] In like manner, if there are advertisements or printed conditions of sale, their tenor cannot be overruled by any conditions verbally announced by the auctioneer.[2]

Fraud.—The exposer must not deceive the bidders by adopting any secret method of raising the bidding, nor will the bidders be allowed to connive with each other to prevent the subject from bringing that fair price which it might otherwise reach. Where the subject was exposed "at the pleasure of the company," it was held illegal for the auctioneer himself to bid, although there was only one offer.[3] It is not unusual for persons selling goods by auction to employ individuals to raise the biddings by fictitious offers. The employment of these persons, called "puffers," "white-bonnets," "decoy-ducks," &c., is illegal.[4] Where one was outbid by a white-bonnet, and was nominally the second offerer, he was held entitled to the property at the price he had offered.[5] It has been held in England, however, that the seller may employ one person "not generally for the purpose of enhancing the price, but for the purpose of guarding against a sale taking place at less than the real value;"[6] and it is held by an authority in Scotland, that "where there is no upset price, and where there is no express stipulation that the goods are to be set up at the pleasure of the company, there seems to be no authority for holding that the proprietor may not bid for the goods, or employ puffers to bid for him, with a view of raising the price."[7] One of the repealed statutes regulating the duties contemplated the circumstance of goods being bought in by the owner. Certainly, however, where there is an upset price, or where the sale is advertised to take place without reserve, no person can legally bid on behalf of the seller.[8] In England, where it was a condition in an auction of horses, that "each horse should be sold to the best bidder," the owner's employing his servant to bid was considered a fraud, and the purchaser was entitled to have the property at the last offer made against a real opponent.[9] It is held that a bankrupt cannot bid for his own bankrupt property; but that his friends may, on their own responsibility, purchase it in for his behoof.[10]

---

[1] Stevenson *v.* Moncrieff, 12th February 1845.—[2] M. on V. and P. 153.—[3] Cree *v.* Durie, 1st Dec. 1810.—[4] M. on V. and P. 148.—[5] Grey *v.* Stewart, 7th August 1753, M. 9560.—[6] Babington, 51.—[7] M. St. xci.—[8] Ibid. Meadows *v.* Tanner, 21st Feb. 1820. 5 Mad. 34 Br. on S. 581.—[9] Crowder *v.* Austin, 9th February 1826. 11 Moore, 283.—[10] Br. on S. 582.

CHAPTER III.

SALE OF MOVEABLE GOODS.

SECT. 1.—*Property and Risk in Undelivered Goods.*

ACCORDING to the doctrine of the civilians, the risk of a thing sold but not delivered is with the purchaser, so that if it suffers any loss, deterioration, or diminution, while in the hands of the seller, the buyer suffers, just as if it increase in value he is entitled to the benefit. But thus to transfer the risk, the contract must be completed on both sides by the specification of the subject of sale. Thus, if A purchase from B a particular sack of corn, the contract is complete, and if the warehouse of B be burned, and the sack of corn destroyed, A can have no action, for the subject of the contract is extinguished. But were B simply to engage to sell to A a sack of corn from his stock, he comes under an obligation to deliver not a particular sack, but any one; and although he may have set aside one for the purpose, which is accidentally destroyed, he has no more right to plead this as annulling his engagement, than the purchaser would have if a sum of money he had set aside to pay for the subject were lost.[1] A contract to deliver property not singled out or specified in a particular place, keeps the risk with the seller until it is conveyed to that place.[2] Carelessness in the custody of the goods, departure from the instructions of the purchaser as to the method of custody or of conveyance, and delaying or impeding the delivery, will throw the risk on the seller.[3] If the subject perish in the seller's custody by reason of such a defect as the seller would have been liable to warrant the buyer against after delivery, he must bear the loss.[4]

SECT. 2.—*Delivery.*

Although the subject, after the contract of sale is completed, remains at the risk of the purchaser, yet he does not become proprietor of it until it is delivered. If the seller fail to deliver it, the buyer is only his creditor, and can bring an

[1] M'Donald *v.* Hutchison, 6th July 1744. M. 10070. St. i. 14, 7. Brodie's Sup. 848.—[2] Milne *v.* Miller, 1st February 1809.—[3] E. iii. 3, 7. Br. on S. 366.—[4] Ibid. 385.

action of damages against him; and so if the seller become bankrupt while the subject is in his possession, the buyer cannot claim it, even though he have paid for it,—he can only rank as a creditor on the bankrupt estate.[1] In theory, the law of Scotland differs on this point essentially from the law of England. There, "as soon as the bargain is struck, the property of the goods is transferred to the vendee,"[2] but the property so vested is called a "qualified" or imperfect property, giving the seller a right to retain the goods till the buyer is prepared to perform his own part of the contract,[3] and so in practice the two systems are nearly assimilated.

The question whether goods purchased have been delivered, generally arises in cases of bankruptcy. The seller becomes bankrupt after the goods are paid for, and the question is, whether they belong to his creditors or to the purchaser; or, on the other hand, the buyer becomes bankrupt before he has paid for the goods, and the question is, whether they are part of his bankrupt estate, making the seller a creditor for the price, or still belong to the seller. The right of Stoppage *in Transitu*, considered in the next section, cuts the knot in many questions of the latter order, and in viewing the two classes of cases it is necessary to remember that this peculiar privilege prevents the one from being the counterpart of the other. It used to be said that whether it were the seller or the buyer who was insolvent, the question just was whether the goods are delivered. But practice has shown that they may be completely out of the seller's estate, so that if *he* became bankrupt they would not go to his creditors, while they are still in such a position that if the buyer become bankrupt, the seller may recover possession of them. Indeed, it is generally at the moment where delivery has been so completely effected as to carry the goods out of the seller's estate, that his right to stop *in transitu* begins. Thus then, in considering the subject of this section in connexion with that which follows, it may be said that the existence of a right to stop *in transitu* by no means shows that the delivery has not been made by the seller, but that wherever the right to stop is barred, that is a certain criterion of delivery having been made.[4]

What act will constitute delivery becomes a question of much importance, and often of the greatest nicety. Delivery into the warehouse of the buyer, or into his cart, or into his

[1] Br. on S. 3. Br. St. 847.—[2] Bl. ii. 448.—[3] Ibid. 447.—[4] See this more fully examined in the author's "Law of Bankruptcy," &c. p. 170, *et seq.*

ship or a ship chartered by him for a definite period and under his directions, is good delivery.[1] Even where the vessel or so much of it is freighted for a particular voyage, or where the goods are put into the hands of a common carrier, though the seller may have the privilege of revindicating possession, they are removed from his estate, and are virtually delivered.[2]

Constructive.—Where the property is in the custody of a third party, an order from the seller to deliver to the purchaser will be the means of transferring possession; and whenever that party understands that he holds the commodity in the capacity of agent for the buyer, the property is transferred.[3] Transference by indorsation of West India and London dock warrants, and other transfer tickets, has been held in England to constitute delivery.[4] But to accomplish this kind of delivery, which is called constructive, it seems to be necessary that the sale be completed, and the subject in a deliverable state, and so no process for ascertaining the subject, such as weighing or measuring, termed in England conditions precedent, must remain to be accomplished. Thus, where of thirty tons of hemp deposited with a wharfinger, ten tons were sold at so much per ton, and the goods were transferred in the wharfinger's books, it was held, that as the weighing had not yet taken place, the hemp was not to be considered as delivered.[5] It would appear, however, that where nothing remains to be done for perfecting the sale on the part of the seller, whatever may remain to be transacted between the buyer and the person who has charge of the goods, delivery may be accomplished. Thus, where a portion of the oil contained in a cistern was sold, and the person having charge gave a receipt acknowledging that he held it in the buyer's name, though it was mixed with oil belonging to the custodier, and the seller had himself purchased it without separating it from the rest, it was held as effectually delivered, though not measured off.[6] A shipmaster holds goods for behoof of the party showing a title to them, and this title is generally a Bill of lading. The bill is a negotiable instrument, and, as will be observed in the following section, it is good in the hands of any onerous holder. Property may be delivered by the seller giving up the key of the repository

---

[1] B. C. i. 173, 174. Dicksons & Company *v.* Ponton, 13th July 1824. 3 Mur. 439.—[2] B. C. i. 174.—[3] Br. St. 872. Broughton *v.* Aitchison, 15th November 1809.—[4] Keyser *v.* Suse, 21st December 1818. Gow, 58. M. on V. & P. 257.—[5] Shapley *v.* Davis, 16th June 1814. 5 Taunt. 617.—[6] Whitehouse *v.* Frost, 6th July 1810. 12 East. 614.

to the buyer.[1] This is generally called "constructive delivery," but it seems more properly to be a real change of possession. In one case the circumstance that the sellers had it in their power to enter the place was found to defeat this method of delivery.[2]

Subject remaining in Maker's Custody.—When any thing is purchased in a manufacturer's hands unfinished, and the price is paid, and the subject is left with him merely to be finished, it would seem that the property is passed, and that the manufacturer is merely custodier for the purchaser. A similar rule seems to hold where the particular component parts of the subject are paid for as they are completed;[3] but questions of the utmost nicety often occur in connexion with this subject. Thus, in England, a person being employed to build a barge, the employer advanced money to account, and before it was finished had paid the whole price. When nearly finished the purchaser's name was painted on it. The builder became bankrupt before it was completed, and it was held to be part of his bankrupt estate.[4] In Scotland, in an earlier case, there was a contract to build a ship; the materials composing the hull to be provided by the builder, but the employer to furnish the other articles necessary to finish it, and the price to be paid in three different portions,—one at laying the keel, another when the vessel was built up and planked to the top of the gunwale, and the remaining sum when the ship was launched. After receiving payment of the first portion the builder became insolvent. It was held that so much of the ship as had been finished was the property of the employer.[5] It has been decided that when goods have a process to go through before they become the commodity which is to be paid for, and the price depends on a criterion which does not exist till that final process has taken place, they are not delivered so as to be carried out of the manufacturer's estate, by being inspected by the purchaser, and directions being given by him as to the manufacture, and samples being taken by him; no mark having been put on the goods, or on the receptacles in which they lie, to designate a change of ownership, and no entry of change having been made in the manufacturer's books.[6]

Subject remaining in Seller's Custody.—When the seller is not also the maker, but offers his goods to all comers, the

[1] Maxwell *v.* Stevenson, 4th April 1831. App. 5 W. S. 269.—[2] More *v.* Dudgeon, 1 B. C. 175.—[3] B. C. 177.—[4] Mucklow *v.* Mangles, 18th June 1808, 1 Taunt. 318.—[5] Simpson *v.* Duncanson's Crs., 2d August 1786. M. 14204.—[6] Boak *v.* Megget, 13th February 1844.

question whether there is any arrangement by which they can remain with him, and yet be considered in law as delivered, is yet more doubtful. It is said that there are certain acts called constructive delivery, the effect of which should be equivalent to actual delivery, but the law has not fixed, by decisions, the character of these acts, nor, indeed, has it decided that any act but that which puts the party in practical possession of the goods, by making him custodier of them, will, at common law, be equivalent to delivery while their place is unchanged. In one case the question was tried, whether delivery may effectually be made without removal from the premises occupied by the vendor, by the goods being deposited in a part of the premises appropriated to the vendee, and their being written off from the vendor's stock in his favour? As, where a wine-merchant being custodier of his customer's wine, it is bottled off and deposited in separate binns, which are appropriated to the purchaser in the binn books. The question was in this case mixed up with another, and though the decision was in favour of the purchaser, the bench were equally divided on this part of the case.[1]

In another case, a farmer had advertised a sale by auction of cattle and sheep. There were written articles of sale, in which it was *inter alia* stipulated, that each lot sold was to be at the risk of the purchaser, "the stock to be kept fourteen days by the exposer; or if the purchaser should prefer lifting in equal proportions, commencing the first week, then the last portion will be kept one month from the date of the sale." The purchaser was to pay ready money, or grant bills with security. There were specific marks on the cattle of each lot, except one. The purchaser bought several lots, among which was the unmarked one. This lot he immediately after the sale drove to Glasgow. Another lot he, with the aid of the seller's servants, drove next day into a field which he had hired from a third party. About the delivery of these there was no dispute. All the lots had been driven into the farm-yard to be sold, and thence, in conformity with the clause as to their custody, those which were not disposed of as above were driven by the seller's servants, at the buyer's direction, into grazing parks occupied by the seller. There were no gates on these parks. The seller became insolvent, and a meeting of his creditors was convened, by whose direction the buyer was prohibited from driving

[1] Gibson v. Forbes, 9th July 1833.

away his purchase. The decision was in the buyer's favour, but was given in such circumstances as to leave it still a doubtful question whether the court held the delivery effectual.[1]

Bonded Warehouses.—By the warehousing act, the occupant of a bonded or other warehouse under the act may sell and constructively deliver his own goods in the warehouse, where there is either a written agreement signed by the parties, or a written agreement executed and delivered by a broker or person legally authorized, and the price is actually paid or secured. On such a sale being entered in a book kept by the officer who has charge of the warehouse, it is a sale and delivery to all intents and purposes.[2]

SECT. 3.—*Stopping* in Transitu.

This is a privilege, held for his own protection, by the seller of goods who has parted with their custody, enabling him to intercept them before they have gone into the possession of the buyer, on the buyer becoming insolvent and unable to pay the stipulated price.[3]

It was formerly a principle of the law of Scotland, in conformity with the customs of Europe in general, that on the bankruptcy of the buyer, the seller is entitled to restitution of goods delivered within a fixed period of that event, which, with us, was limited to three days. On the other hand, it has been the principle of the English law, that the stock of the purchaser shall not be apparently increased by goods on which any other party has a claim, and therefore that so soon as property is in the possession of the buyer, it becomes part of his stock for division among his creditors if he become bankrupt. By a decision in the House of Lords, the practice of Scotland was adapted to the same rule,[4] and the seller is no longer entitled to *restitution* of the subject sold in any circumstances; but if it has not passed into the possession of the buyer, and is still in the hands of a middleman, he is entitled to stop it *in transitu*, or stop it on the way,—if the price have not been paid. In England, where the property passes from the moment of the completion of the contract, this practice is said to arise out of a right of Lien in the seller—that is, a right to keep possession of goods which are

[1] Lang *v.* Bruce, 7th July 1832. See "Law of Bankruptcy," &c. 173, 174.—[2] 8 & 9 Vict. c. 91, § 8.—[3] Law of Bankruptcy, &c. 182, 183.—[4] Allan, Stewart, & Company *v.* Stein's Creditors, 4th December 1788 and 23d December 1790. M. 4949.

the property of another party. In Scotland, it is the resumption of the goods, and a suspension of the fulfilment of the contract by the seller, until the buyer is prepared to perform his part.[1]

To whom available.—This is an equitable privilege to the seller for securing his price. It can be had recourse to by him alone or at his order. It is denied to a factor, cautioner, or any person possessing an incidental interest in the transaction;[2] and it has been decided in England, that where the original seller has been paid, he cannot stop the goods for behoof of his purchaser who has re-sold them.[3] The privilege cannot be used in any other circumstances but the bankruptcy or insolvency of the buyer before delivery.[4] Stopping *in transitu* is not an extinction of the contract, it is a mere security for payment; and so it is said that if the creditors choose to implement the bargain entered into by their debtor, the seller must make delivery.[5] It is a general rule chiefly exemplified in England, that when the goods have been actually delivered, the buyer cannot return them, so as to favour the seller above his other creditors.[6] If he knows himself to be insolvent when the goods are offered, it is his duty, as a counterpart of the seller's right, to refuse them.[7] When a man becomes *bankrupt*, however, he ceases to have any command over his property. It cannot be said, then, that in such circumstances he is entitled to reject goods offered for delivery, while in England it has been held that bankruptcy does not operate as a tacit stoppage *in transitu*. It is an opinion, however, that a different doctrine would rule in Scotland,[8] and in one case it was found that if a buyer intimate his insolvency to other creditors, but fail to intimate to the seller, who, not being warned, does not attempt to intercept delivery, the receiving the commodities in such circumstances is contrary to good faith, and they must be restored.[9]

In what Cases.—The circumstances under which the seller may stop are subject to very nice distinctions. So long as the property is at his own order or that of his servants, he cannot be said to stop, he merely retains. When it is in the hands of a middleman (such as a warehouseman, or carrier by land or water), such a person may be said to hold it so as to preserve on the one hand the right of property in the

---

[1] Br. St. 865.—[2] B. C. i. 225. Smith's M. L. 504. M. on V. and P. 191.—[3] Henley's B. L. 317.—[4] Br. on S. 442.—[5] Ibid. 441.—[6] Henley's B. L. 329.—[7] B. C. i. 232.—[8] B. P. 1309.—[9] Schurmans *v.* Goldie, 9th July 1828. See Drake *v.* M'Millan, 8th July 1807. Hume, 691.

buyer, and on the other the seller's right of security for the price. "In cases where the propriety of a resumption of this sort is questioned, the point disputed generally is, whether at the time of seizure by the vendor, the transit of the goods had or had not determined. Such cases always mainly depend upon their own peculiar circumstances, but the general rule to be collected from all the decisions is, that goods are to be deemed *in transitu* so long as they remain in the possession of the carrier, as such, whether by water or land, even though such carrier may have been appointed by the consignee himself; and also while they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee. Thus, if goods be landed at a seaport town, and there deposited with a wharfinger appointed by the consignee to forward them thence by land to his own residence, they are subject to the consigner's right of stoppage while in the hands of the wharfinger. If indeed a consignee be in the habit of using the warehouse of a carrier, packer, wharfinger, or other such person, as his own, for instance by making it the repository of his goods, and disposing of them there, the transit will be considered at an end when they have arrived at such warehouse. In such cases, however, when the right of stoppage *in transitu* is to be defeated by a constructive possession through the medium of the carrier, acts of dominion exercised by the vendee over the goods while in the carrier's hands (as for instance by taking samples), will not have the effect of creating such a constructive possession, unless they be accompanied by such circumstances as denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent *for custody*. Nay, if, after goods are sold, they remain in the vendor's own warehouse, and he receives warehouse rent for them, that operates as a delivery to the purchaser, and puts an end to the right to stop *in transitu*: and it hath been decided, that where part of the goods sold by one entire contract is taken possession of by the vendee, without any intention on the vendor's part of retaining the rest, that is to be deemed a taking possession of the whole; though it is otherwise if there were such an intention."[1] It has been decided in Scotland, that when goods are put on board a ship which is freighted by the purchaser for the voyage, the transitus is not at an end, and the seller may stop; but it is be-

[1] Smith's M. L., 505-506.

lieved that it would be otherwise were the ship hired by the buyer for a term of time.[1] Delivery of a portion of a cargo does not bar the right to stop the remainder.[2] It has been decided that the seller cannot stop when the buyer has put his mark on the goods, after they have been deposited in a place of public accommodation, as an inn.[3] So also, where a shipmaster has given a special receipt for the goods as shipped by the buyer.[4]

Bill of Lading.—Where bills of lading have been indorsed for value, the goods cannot be stopped, on account of the price not having been paid to the original seller, unless the indorsement have been made with information of the insolvency of the indorser, or before the goods have been put on board, by an understanding with the shipmaster.[5] It does not affect the transference that the indorsee may have simply known that the goods have not been paid for.[6] By statute, the right to stop is barred, in so far as it might affect the disposal of the effects represented by any of the following documents, when made by "any person intrusted with or in possession of it," viz. "any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods," provided the buyer has no notice on the face of the document, or otherwise, that the person intrusted with it is not the true owner of the goods represented by it.[7]

The buyer's getting possession of the goods will not prevent the stoppage, if he have failed to fulfil an absolute condition attached to the delivery, as, that the price should be paid, or a bill given;[8] and it has been decided in England, that if a carrier, or other person having charge of the goods, deliver them by mistake, after receiving an order to stop them, restitution may be obtained.[9]

---

[1] Law of Bankruptcy, &c. 185.—[2] Ibid.—[3] Ellis *v.* Hunt, 3 T. R. 464.—[4] B. C. i. 203.—[5] Br. St. 862. B. C. i. 203, *et seq.* M. on V. and P. 195.—[6] M. on V. and P. 196.—[7] 6 Geo. IV. c. 94, § 2. Law of Bankruptcy, 189.—[8] B. C. i. 223.—[9] M. on V. and P. 200. Henley's B. L. 323.

CHAPTER IV.

TRANSMISSION OF RIGHTS IN LAND.

SECT. 1.—*Conveyance to a Purchaser where Seller's Title is complete.*

THE method of constituting a Fee, and creating a complete Title, has already been considered.*

The fee thus brought into existence may be transferred to a purchaser, by a process which denudes the original vassal, and puts the purchaser in his place. The deed which, in this transaction, corresponds with the Charter, in giving the purchaser the power to make good his right by Infeftment, is called a Disposition. It contains a Narrative, Cause of Granting, Dispositive Clause, Warrandice, Clause of Registration, &c., in terms similar to those of the charter.† It, however, does not contain the *Tenendas* and *Reddendo* (which express the nature of the feu, and the conditions on which it is held), because the new vassal is to hold in every respect as his predecessor did.[1] The obligation to infeft is peculiar. It binds the seller to give infeftment to the purchaser, either to hold of himself or to hold of his superior, and the precept of sasine is expressed in such general terms as may be applicable to either of these cases.[2] The alternative enables the purchaser either to infeft himself as vassal to the seller, and afterwards work off the seller's intermediate superiority by getting a Confirmation from the superior, or to resign the fee into the superior's hands, and procure a new Charter from him. To enable the purchaser to adopt this latter alternative, the obligation to infeft is followed by a Procuratory of Resignation, or mandate authorizing the fee to be resigned to the superior that he may invest the new vassal.[3]

The Warrandice, in an ordinary disposition, unless otherwise defined, is absolute, *i. e.* the seller warrants the purchaser against all defects of title and burdens.[4] ‡ If the property be recovered from the buyer through defect of title in the seller, the former will be entitled to damages equal to the value at the period of eviction.[5] The purchaser is not bound to defend his right if an action is brought against him on the

* See p. 52, *et seq.*—† See p. 54.—[1] B. on C. T. 27.—[2] Ibid. 36.—[3] Ibid. 42. R. L. ii. 272.—[4] B. on C. T. 44.—‡ See p. 149.—[5] E. ii. 3, 30. Br. on S. 270.

ground of defect in the seller's title, but he should give warning to the seller; and if, through his delay in doing so, the seller be foreclosed from pleading any defence he would otherwise have, the latter is released.[1] The warrandice is not directed against such burdens as arise from the nature of the property or the operation of law, unless they are specified.[2] The buyer may call on the seller to remove all impediments to the title, and encumbrances, before he is bound to pay the price. It is sufficient that the seller produce an effectual title by *Prescription*.*

The purchaser, on receiving the Disposition, may immediately get himself infeft by virtue of the indefinite Precept of Sasine. If no other process intervene, this is what is termed a Base infeftment, the purchaser holding not of the seller's superior, but of the seller himself. The property is thus protected to the purchaser from diligence for the debts of the seller, and from any subsequent title granted by him to another person;[3] but if the purchaser wish to be put in the seller's place, and to hold his lands of the original superior, he must adopt one or other of the following methods for completing his title.

SECT. 2.—*Completing Title by Resignation.*

When the feudal vassal restored the estate to the superior, by whom it had been granted to him, he appeared before him, and resigned it into his hands by the delivery of a symbol. If the superior is the purchaser of land holding of himself, such is still the process by which he is re-invested in it. The disposition to the superior contains a Procuratory of resignation, on the authority of which the procurator appears before the superior or his commissioner, and resigns the fee into his hands, by delivery of "staff and baton." The ceremony is sufficiently performed before the superior's "known agent." The infeftment of the vassal is thus extinguished, and the right of the superior revives. The ceremony is narrated in an instrument which, as it has the effect of an infeftment in favour of the superior, is recorded in the register of sasines. By statute the notary public's "Long Docquet," which used to be adhibited to the instrument, is abolished.[4]

When the vassal intended, not to restore the fee to the superior, but to transfer it to some other person, he required

---

[1] Br. on S. 264.—[2] B. on C. T. 45.—* See p. 59.—[3] B. on C. T. 252.—[4] E. ii. 7, 19. 1669, c. 4. R. L. ii. 228. 8 & 9 Vict. c. 35, § 8.

to resign it into the hands of the superior, who would, if he consented to the arrangement, re-deliver it to the person pointed out by the original vassal. Formerly the superior might refuse his consent, and if, having consented, he died before fulfilling his promise, his heir could not be compelled to perform it. By the act 1469, c. 36, for the security of creditors the superior was compelled to invest an adjudging creditor of the vassal on payment of a year's rent of the lands. When the superior refused to invest a purchaser the seller granted to the latter a trust-bond, on which he led an adjudication (*see this head in Index*), and on proffering the year's rent, compelled the superior to invest him. In the act of 1747 a clause was inserted to enable persons who held procuratories of resignation from vassals, to compel superiors by a charge of horning to grant them investments.

Entry-money.—The payment of a year's rent on each investment had in the mean time become an established practice, and continued to be claimed by and paid to the superior, after the passing of the act, which reserved to him "such fees or casualties as he is by law entitled to receive."[1] This sum is called Entry-money. It consists of a year's rent of the estate in so far as enjoyed by the vassal, and so, if the vassal have built houses on the land, their rent will fall to be added;[2] but if he have feued it off to be built on by others, the amount of the feu-duty only can be demanded.[3] In the original charter, it is usual for the superior to tax the entry-money to a limited sum, such as a double feu-duty. Entry-money is payable only by "singular successors," or persons acquiring by gift or for a pecuniary consideration, and not by heirs, either by legal succession or destination; so, the substitute in an entail, though not a blood relation of his predecessor, pays only the usual casualty of relief.[4] On paying the entry-money, the purchaser is entitled to obtain investment in his own favour, and to any order of successors among his heirs-at-law, or he may demand that his new charter and precept shall be assignable before sasine, the assignee having as broad a title as the original purchaser, viz. a destination to himself and any order among his heirs-at-law which he may fix.[5]

The act of resignation is performed in the same manner as that already stated, with this difference, that, as the lands are not given back to the superior himself, he immediately

[1] 20 Geo. II. c. 50, § 12. R. L. ii. 302.—[2] Anderson *v.* Marshall, 30th November 1824.—[3] Ross *v.* Heriot's Hospital, 6th June 1815.—[4] Stirling *v.* Ewart, 14th February 1842.—[5] Hamilton *v.* Hopetoun, 8th March 1839.

delivers the symbol to the purchaser or his procurator. An instrument detailing the ceremony used to be prepared, but it fell into desuetude, and was finally abolished by statute.[1] By re-delivery of the symbol, the superior gives the land to the new vassal, but he does not thus put him in personal possession of it. This final act must be accomplished by a ceremony analogous to that by which a fee is constituted. The superior grants a charter of resignation, which is chiefly distinguished by a clause called the *Quœquidem*, reciting the manner in which the fee came back to the superior's hands by resignation. As this charter gives only the title as it was resigned into the superior's hands, it contains no warrandice. On the precept of sasine contained in the charter, the purchaser takes infeftment, and his right as vassal to the original superior is then completed.[2]

SECT. 3.—*Completing Title by Confirmation.*

There is another method by which the superior may consent to receive a new vassal, termed Confirmation. In the early stages of the law, when a Procuratory of Resignation or a Precept of Sasine fell by the death of the granter, and when it depended much on the superior's pleasure whether he would invest a new vassal or not, it was a great object with the purchaser to secure himself in the mean time against the acts of the seller and his creditors. For this purpose he procured a precept, authorizing him to take infeftment as vassal to the seller. By such means sub-infeudations were accumulated, and independently of the confusion of titles so occasioned, the more superiors the vassal had over him, the greater was the risk of his lands being forfeited for their offences. The subvassal had therefore a material interest in reducing the number by exchanging his holding of the seller for one of the seller's superior. While his infeftment, however, was only from the former, there was no process by which he could alter the nature of the holding. Hence, it became the practice to require from the seller two precepts; one to enable the purchaser to hold of him (*de se*), the other to enable the purchaser to hold from him of his superior (*a se de superiore suo*). When the purchaser took infeftment on the former, his right was made real as vassal to the seller. When he took infeftment on the latter, he completed no right in the mean time, but prepared a title for the superior's sanction;

[1] 8 & 9 Vict. c. 35, § 9.—[2] B. on C. T. 254, *et seq.*

and when this infeftment was confirmed by a charter of confirmation, he then held of the superior.[1]

In progress of time the system was simplified. The Precept of sasine was made ambiguous, neither authorizing exclusively a holding of the vassal nor of the superior,—and the purchaser when he took infeftment attributed his holding according to circumstances. Immediately on receiving the disposition and precept, he can now take an infeftment, by which he in the first instance holds of the vassal who conveys to him, and he can then procure a charter of confirmation, by which the nature of the holding is changed to one of the superior.[2]

SECT. 4.—*Conveyance where Seller's Title is not complete.*

In the above details the person disposing of his property is presumed to be himself fully invested by a sasine in his own favour. A slightly different form will be adopted, if instead of being infeft he is only entitled to be so. Thus the seller's ancestor may have been infeft, while the seller has not been served heir to him.* The Disposition will in such a case be in the usual form, down to the obligation to infeft, which will bear that the granter binds himself to procure himself served and retoured heir to his ancestor at his own expense, and after being so, to infeft the purchaser; and to enable the purchaser to enforce fulfilment of the obligation, there is a procuratory for the purpose of getting the granter served heir to his ancestor, and infeft.[3] The seller may either have got a disposition in his own favour, on which he has not been infeft and entered with the superior, or he may have succeeded to such a title left by his ancestor. In the latter case, as a preliminary step, he will have to make up a title by a general service.† Possessing then a Procuratory of resignation and a precept of sasine, in which he could himself make up his titles in the manner above described, to save an accumulation of deeds, he conveys these rights to the purchaser, particularly describing them in the assignation to the titles.[4] The latter then makes up his titles, as if the procuratory and precept had been originally conceived in his own favour.

SECT. 5.—*Conveyance of Burgage Property.*

The explanation of the peculiarities applicable to the ten-

[1] B. on C. T. 17, *et seq.* R. L. ii. 252, *et seq.*—[2] R. L. ii. 272. B. on C. T. 281.—* See above, p. 100.—[3] Bell on Deeds, i. 111. Jur. St. i. 108. B. on C. T. 78.—† See p. 102.—[4] Bell on Deeds, i. 113. Jur. St. i. 108.

ure of this description of property already made* have necessarily included a notice of the manner in which it is transferred from person to person.

The seller, not being entitled to have a vassal under him, cannot give a precept of sasine for infefting the purchaser; he can only put the purchaser in his own place, by resigning into the hands of the magistrates, as commissioners to the crown, for infeftment to be granted to the new owner. In the disposition, therefore, which is granted by the seller, and which in other respects resembles the ordinary feudal disposition, he appoints procurators to resign his title into the hands of the magistrates by the symbols of staff and baton. The magistrates having received the resignation, give over the property to the purchaser, or his attorney, by the symbols of earth and stone, and hasp and staple, or by delivery of a pen in the council-chamber. The town-clerk acts as notary, narrating the resignation and the sasine in one deed, called an Instrument of Resignation and Sasine.[1]

CHAPTER V.

MISCELLANEOUS METHODS OF TRANSFER.

SECT. 1.—*Assignment.*

DEBTS and obligations are transferred by Assignation, or as it is now generally termed Assignment. Bills of exchange, a method of transfer so important as to require separate consideration at length, are a species of assignment. The person who transfers is called the Cedent; the Receiver the Assignee. The leading peculiarity of this species of transfer is, that it is completed to the effect of defeating the rights of third parties, by notice to the debtor or other party subjected to the original obligation, who is thus warned that the obligation is transferred to a new holder. "Though an assignation not intimated be valid against the granter, who cannot question his own deed; yet if, before intimation of a first assignment, the cedent shall grant a second to a different assignee, the second, if it be intimated before the first, will be preferred to the first. * * * If an assignation be not

---

* See p. 58.—[1] B. on C. T. 133. Jur. St. i. 604. 8 & 9 Vict. c. 35, § 7.

intimated by the assignee during the life of the cedent, any creditor of the cedent, who upon his death shall confirm the debt assigned before the assignment be intimated, shall be preferred to such assignee."[1] The debtor's private knowledge that there has been an assignment will not supply the place of notice.[2] If sequestration of the cedent's estate precede it, the intimation will be ineffective to take the right out of the sequestrated estate.[3] There is a peculiarity in the assignment of leases. As the landlord is the receiver not the payer of the debt, the creditors of the tenant have no interest in his receiving intimation, and Possession of the subject of the lease by the assignee marks the time when the transfer has been completed so as to affect them.[4]

Assignments are specially considered in connexion with various branches of the law discussed in this volume.

The conveyance of an uncompleted title to land by assignation is specially examined in the chapter on the transference of rights in land. (*See* p. 172.)

Patent Rights, and Rights in literary property are transferred by assignment, and in the latter case a special form is provided by act of parliament. (*See* p. 89, *and* p. 71.)

Bills of Lading, more especially connected with the contract of Letting and Hiring as applied to ships, are considered, along with other documents of a like character, in the effect which their onerous transference has in defeating the privilege of stopping *in transitu*. (*See* p. 164.)

SECT. 2.—*Transfer of Rights in British Vessels.*

The sale of the whole or of part of a ship, by one British subject to another, requires a written instrument, called a Bill of sale, containing a recital of the Certificate of registry. In the case of any serious mistake which might leave the identity of the ship doubtful, the document is null, and no action can be maintained on it; but any petty mistake, or the accidental recital of the wrong certificate of registry, will not vitiate it.[5] The bill of sale does not pass the property to the purchaser until an entry has been made in the register, of the name, residence, and description of the vendor and purchaser respectively, and the date and production of the bill of sale; and (unless a new registry is to be made) the same particulars have to be indorsed on the certificate of

[1] E. iii. 5, 3.—[2] Dickson *v.* Trotter, Hailes, 675.—[3] See the Law of Bankruptcy, &c. 317.—[4] Ibid. 234.—[5] 8 & 9 Vict. c. 89, § 34.

registry.[1] This indorsement is the criterion of preference among registered claimants, he who has the first indorsement having the preferable right to the property.[2] After one transfer is entered, another must not be entered from the same granter, until the lapse of thirty days after the entry of the former, or after the return of the vessel if she was then absent. Where there is more than one claimant for an indorsement, after a transfer has been entered, it must be given to the person who presents his certificate within thirty days from the entry of the transfer, or from the return of the vessel if the transfer was made in her absence; but if no one presents within that period, the indorsement may be made to the first claimant.[3] There are provisions applicable to cases where it may be inconvenient to bring the ship to her port of registry, and for enabling sales to be made in absence of owners by their agents, under the superintendence of the commissioners of the customs, on their being satisfied of the fair dealing of the parties, and receiving security.[4] On every transference of property a new registry may be obtained, if the owners shall desire it.[5]

Where property in a ship is mortgaged in security for debt, or assigned to a trustee to be sold for payment of debt, entry in the register and indorsement take place, expressive of the limited nature of the transfer;[6] and such a transfer is effectual against the creditors of the owner, if he should become bankrupt after making it.[7]

---

[1] 8 & 9 Vict. c. 89, § 37.—[2] Ibid. § 39.—[3] Ibid.—[4] Ibid. § 44.—[5] Ibid. § 42.—[6] Ibid. § 45.—[7] Ibid. § 46.

PART VI.

CONTRACTS INVOLVING COPARTNERSHIP.

CHAPTER I.

COMMERCIAL COMPANIES.

SECT. 1.—*Nature and Constitution of the Contract.*

THIS description of partnership is a contract by which two or more individuals unite their property, talents, or labour, with the view of dividing the profit or loss according to some fixed ratio. It is not necessary that each partner make the same kind of contribution to the common fund. One may provide money, another labour, another skill, and a third perhaps his credit, or the influence of his name.[1] The joint property or stock is held by all the partners in trust for the uses of the society. It is liable in the first place to meet the debts of the partnership, and in the second to the claims of the individual partners according to their agreement.[2] The contract has the effect of an obligation to transfer the property intended to be made common from the individuals to the company, and when the necessary solemnities of transference,—as Tradition in moveables, Infeftment in heritage, —have been performed, the property vests in the company.[3] An unincorporated company, however, cannot hold feudal property in its social name; the names of the partners must be used.[4] The same rule appears to have formerly applied to all actions defended or pursued by companies,[5] but it seems now to be held that while a company, which has merely a descriptive name, such as "The Culcreuch Cotton Company,"

---

[1] E. iii. 3, 19. Smith's M. L. 22, *et seq.*—[2] B. C. ii. 612.—[3] Ibid. 614.—[4] B. P. 357. See Denniston & Co. *v.* Macfarlane, 16th February 1808.—[5] Aitchison & Co. *v.* Burnside's Trustees, 4th February 1832.

must prosecute or defend in the name of the partners, a mercantile company carrying on trade under a proper firm, by which it draws bills, &c., as "John Hare and Company," may be called in an action and cited by the firm, without the name of any individual partner.[1] A partnership under a firm of this description may hold a lease by its social name.[2] Pupils, idiots, and others incapable of consent, cannot enter on this contract to the extent of being liable, even with consent of their tutors. Such a person may, however, acquire, by descent or otherwise, a beneficiary interest in any concern, the partners of which may be liable to communicate to him a share of the profits while he is relieved from loss.[3] The *delectus personæ*, or preference for the individual, is strongly implied in a contract where those concerned must repose so much confidence in each other. It will consequently require a very explicit agreement to admit parties to a company from incidental title, as descent, assignation, &c.[4] In public and joint stock companies, where the responsibility is limited to the money paid, shares descend to heirs, may be sold, and are attachable by creditors.[5]

SECT. 2.—*How one may become a Partner.*

The members of a company come under two different kinds of obligation, the one a general obligation to the public having transactions with the company, the other specific between the members. The former is incurred to its full extent by the mere circumstance of becoming or appearing to become a partner in a company,—as by receiving a share of the profits, though it should be in the name of rent or wages; and in Scotland it has been so held even where the sum is not subject to fluctuation in the same ratio with the profits.[6] It has been laid down in England, that if one stipulate for a regulated sum, even though its extent should depend on the amount of profits, he is not a partner, "but if he agree for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third parties, a partner, and no stipulation can protect him from

[1] Culcreuch Cotton Company *v.* Mathie, 27th November, 1822. Kerr *v.* Clyde Shipping Company, 8th June 1839. Robertson *v.* Anderson, 4th June 1841. London, Leith, &c. Shipping Company *v.* M'Corkle, 19th June 1841. Forsyth *v.* Hare and Company, 18th November 1834. Thomson Bonar and Company, Advocators, 30th November 1836.—[2] Denniston and Company *v.* Macfarlane, 16th February 1808.—[3] B. C. ii. 624.—[4] Ibid. 620.—[5] Ibid.—[6] M'Kinley *v.* Gillon, 30th November 1830. App. 5 W. & S. 468.

loss."[1] One will be bound by advancing money, the interest or other consideration for which depends in amount on the extent of the profits.[2] One coal-dealer having agreed with another to bring customers to the concern, receiving an annuity and 2s. for every chaldron so sold, was held to be a partner, he having suffered his name to be used.[3] The line of distinction is one of extreme nicety. Mr Smith observes, in his earlier editions, that "to constitute such a *community of profit* as is here intended, a partner must not only share in the profits of his companions, but must share in them *as a principal, i. e.* he must not be a mere agent, factor, or servant, receiving in lieu of wages a sum proportioned to the profit gained by his employers. Thus, where a broker, employed to sell indigo, was to receive for his trouble, instead of commission, all he could get for it above 2s. 6d. a-pound, the Court of Common Pleas held that he was an agent, not a partner, and consequently that he was admissible as a witness for his principal, in an action brought by him for the price of the indigo. But where, in a subsequent case, a broker was not only to be paid in proportion to the profits, but also to bear one-eighth of the loss, the Court of King's Bench seemed to think it a partnership; and indeed this distinction between a partner, and an agent remunerated in proportion to the profits, and whose income will consequently fluctuate with their fluctuation, is not very easy to apply, and Lord Eldon has lamented its excessive nicety."[4]

The partners cannot avert such responsibility by any contract between themselves.[5] One who allows his name to be used on bills of parcels, or invoices, or on the sign over the door of the establishment, will be responsible as a partner, though notice of dissolution have been given in the Gazette;[6] and it would appear that in such a case he may be bound to a creditor who was not aware of the circumstance of his so appearing as a partner, and therefore could not have contracted on his credit.[7] A person may be partner with one of the partners of a company in regard to his share, without being responsible as a partner of the principal company.[8]

Between Partners.—Partnership, in as far as respects the obligations of the partners to each other, is an ordinary con-

---

[1] Lord Chancellor (Eldon) in *ex parte* Hamper, 17 Vesey, 412.—[2] *Ex parte* Chuck. 1832, 8 Bing. 469.—[3] Young *v.* Axtell, quoted Waugh *v.* Carver, 2 H. Blackst. 242.—[4] Smith's M. L. First Edition, 4, 5.—[5] Collyer, 53, *et seq.*—[6] Collyer, 370. Williams *v.* Keats, 2 Starkie, 290.—[7] Smith's M. L. 6.—[8] Fairholm *v.* Marjoribanks, 23d January 1725, M. 14558.

sensual contract, depending on evidence of the consent of the parties. It may thus either be constituted by a solemn probative writ (*see* p. 133), or by any of those less formal documents privileged from their use in commercial matters, as letters interchanged, entries in books, &c., or may be inferred from circumstances, or proved by witnesses.[1] The circumstance of a person receiving a salary or other remuneration for exertion, commensurate with the profits, will not make him a partner in this sense of the term, although it may render him responsible to third parties.[2]

SECT. 3.—*Mutual Rights and Liabilities of Partners.*

The extent of each partner's interest in the concern will of course be generally regulated by the terms of the contract. Where no provision is made for a distinction of interests, equality is presumed.[3] In England, where a father and son were in partnership without express stipulations, the business having been created and the capital provided by the former, a jury, under direction that there was no claim for an equal division, found that the son's proper share of the profits was one-fourth.[4] Although the Lord Chancellor (Eldon) questioned the propriety of this decision, and intimated an opinion that the son should have had the half or nothing, the principle has been confirmed in a case appealed from Scotland, where it was held that in absence of all evidence to the contrary, equality was to be presumed, but that a different division might be supported from circumstances, and that it was for a jury to decide what would be a fair division proportioned to the contributions of the parties.[5]* It is inconsistent with the principles of the contract that a partner should be exposed to loss without having a chance of reaping profits, but it may be stipulated that a partner who is to share in the profits shall be exposed to none of the loss, a provision which of course only affects the claims of the partners on each other, and cannot interfere with those of creditors.[6] "In such a case he will be a partner, enjoying, in addition to the advantages of partnership, the indemnity afforded him by his companions."[7]

[1] B. C. ii. 622. Orr and Company *v.* Pollock, 12th June 1840.—[2] Geddes *v.* Wallace, App. 1820, 2 Bligh, 270.—[3] E. iii. 3, 19.—[4] Peacock *v.* Peacock, 4th March 1809, 2 Camp. 45.—[5] Thomson *v.* Campbell's Trustees, 14th February 1831, 5 W. & S. 16.—* A similar rule of division seems to be followed in France. *Code Civil Par.* 1853.—[6] E. iii. 3, 19. B. C. ii. 646. Smith's M. L. 3.—[7] Collyer, 11.

Where given proportion of profit is specified, the partner will have to meet the same proportion of loss, unless it is otherwise stipulated.[1]

Each partner is bound to the others to pay up his share of the common stock. Each is a creditor of the company to the amount of his paid up stock, of his share of profits not drawn, and of any sums advanced by him, or which may be due to him in the way of salary as manager, &c.[2] The creditors or executors of a partner, bankrupt or deceased, are entitled to the balance in his favour, as at the moment of his bankruptcy or decease.[3] A partner may be debtor to the company, and the company will have a claim like any other creditor, giving credit for the partner's share of stock and profit.[4]

The company have a claim on each partner for such personal attendance on the affairs of the company as may be stipulated, or must be presumed from the nature of the concern; and "if a person enter into a partnership concern, in which he contributes a certain portion of capital and labour, unless he stipulate that he shall receive a greater remuneration for his labours than the other partners, he cannot claim it."[5] This will apply to any trouble undertaken by a partner, however far beyond what is undertaken by the others, or however inconvenient to the partner.[6] Where a partner claimed remuneration as a clerk of a committee of the company for taking evidence, transcribing, preparing cases for counsel, &c., he was held entitled to claim only for his advances, and for the cost of writings prepared in his office.[7] Where a partner acting as manager had an allowance of a per centage on the transactions, he was entitled to a similar allowance for winding up the company affairs, without stipulation.[8]

Whatever property a partner obtains in the name of the company becomes immediately vested in it,[9] and the company have even a claim on any beneficial acquisition made by a partner though in his own name, if it be in the company's line of trade.[10] A partner will not be entitled to conduct a business which gives him an interest adverse to the partnership undertaking.[11] Where one was engaged in a

---

[1] Collyer, 10, *et seq.*—[2] B. C. ii. 657.—[3] Ibid. 658.—[4] Ibid.—[5] Lord Gifford, in Campbell, &c. *v.* Beath, App. 2 W. & S. 25.—[6] Hunter *v.* Cochrane's Trustees, 18th February 1831.—[7] Duncan *v.* Union Canal Company, 8th February 1831.—[8] Berry *v.* Lamb, 7th July 1832.—[9] E. iii. 3, 20.—[10] B. C. ii. 614.—[11] Collyer, 118.

company for which it was his duty to purchase the materials, and in doing so he paid the sellers by goods in his own particular line of trade, he was found liable to account for the profits made by the barter of the goods, as it was his duty to make the purchases at the lowest possible price.[1]

SECT. 4.—*Authority and Liability of Partners as respects the Public.*

Each partner has in the eye of the public an unlimited right of management, and is entitled to contract for the company, and pledge its credit in all matters within the scope of the business carried on.[2] If a partner, therefore, raise money in the company's name, and apply it to his own purposes, the partnership will be liable, unless "under the circumstances the party [taking the obligation] can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding."[3] In such a case it would be considered "against good faith" that he should pledge the partnership, and the claimants are bound to show previous authority or subsequent approbation before they can claim against the company.[4] Thus, where payment of a bill signed with the name of a firm by one of the partners was claimed from the other, it was held that, as it "was not made in the business of the company, but formed part of a series of private transactions between the pursuer and [the partner who signed it] individually, which must have been known to the pursuer to be of that description," the copartner was not liable.[5] The act of a single partner has only a presumption in its favour, and therefore in transactions beyond the proper objects of the company, a special authority or concurrence will be requisite, although the act should be one on which it was by no means improbable that such a company would enter,—as, in guaranteeing a debt, agreeing to an arbitration, &c.[6]

Each partner is personally responsible for the engagements of the company. In this respect each acts as cautioner, but the partner has not like a cautioner the benefit of discussion (*see* p. 213), his personal responsibility arising im-

---

[1] Burton *v.* Wookey, Madd. & Geld. 367.—[2] B. C. ii. 615.—[3] Chancr. Eldon in *ex parte* Bonbonus, 8 Vesey, jun. 540.—[4] Ibid. Hope *v.* Cust, quoted in Sheriff *v.* Wilks, 1 East, 53.—[5] Blair *v.* Bryson, 11th June 1835, and see Miller *v.* Douglas, 22d January 1811.—[6] Duncan *v.* Loundes, 1813, 3 Camp. 478. E. iii. 3, 20.

mediately on the non-fulfilment of the engagement.[1] On this principle, when a company is an obligant in a bill, the holder may proceed with diligence against any individual partner; not being bound to proceed against the partnership estate in the first place.[2] A partner who has thus met an engagement becomes a creditor of the other partners.[3]

The distribution which will take place when the firm or a partner becomes bankrupt will be considered in the portion of the work which is assigned to bankruptcy.

SECT. 5.—*How the Responsibility to the Public is terminated.*

No private agreement between the partners of a company can alter the individual responsibility of each for the whole debts of the company, however much it may affect their relative rights of recourse on each other.[4] The death of a partner dissolves the company unless it is otherwise stipulated; it is doubted whether creditors must have notice of the death to save the deceased's estate from responsibility for the farther transactions of the other partners in the company's name.[5] It will generally be difficult when a partner dies during the active operations of a company to draw a line between the transactions for which his estate is responsible, and those for which it is not. The following principles have been deduced from the decisions of Sir William Grant, and are particularly applicable to the case of a banking company, where, from the nature of the transactions, it is generally presumed that the individuals leaving money in the hands of the remaining partners trust to their credit, and release the representatives of the deceased:—"1. That where a balance is due at the death, and there is no subsequent operation but by drafts to reduce it, the representatives of the deceased continue liable for what remains. 2. That where in the course of subsequent operations the balance has been fully paid, a new balance resulting afterwards cannot be viewed as a debt against the representatives of the deceased partner. 3. That where a balance is due at the death, which the subsequent operations increase, but which is never reduced, the representatives are liable. 4. That where stock is intrusted to a company, and managed with its own stock in name of one of the partners, who sells it and

[1] B. C. ii. 618.—[2] Wallace *v.* Plock and Logan, 19th June 1841.—[3] B. C. ii. 619.—[4] Ibid. 638. Ramsay's Executors *v.* Graham, 18th January 1814.—[5] B. C. ii. 639.

applies the money to the partnership, the representatives of the deceasing partner are liable. 5. That on the deposit of bills or Indian bonds with the company, which are extant at the death, and sold by the surviving partners, there is no demand against the representatives of the deceased partner."[1]

Where a company is dissolved by consent, or a partner retires, responsibility is not terminated without notice; but where the remaining partners form other connexions and adopt a new firm, a retiring partner ceases to be responsible even where there is no notice.[2] A retiring partner, however, cannot consider himself safe from responsibility to the customers of the company, unless he send them special notice. It is open to proof that a customer has received notice otherwise—as, that he has perused an advertisement publishing the retirement, &c.;[3] but the mere publication of an advertisement is not of itself sufficient notice to customers who dealt with the company before the notification.[4] An obvious change in the firm brought under the observation of the customer from its appearing on the checks or notes of a banking house, or on invoices, &c., is held good notice, as warning him that he has to trust to the credit of a new firm.[5] But the individual who has been connected with a firm is liable not only to the general customers, but to any stranger who may chance to deal with the firm before he has given notice of his ceasing to be connected with it. To this effect public advertisement will be sufficient, and it is believed that an advertisement in the Gazette and in a newspaper circulated in the district will be effectual.[6] In England it is distinctly laid down that notice in the Gazette alone is sufficient.[7] If the advertiser permit the evidence of the advertisement to be contradicted by other circumstances—as, by allowing his name to remain on the sign, to be used in the invoices, &c., he will continue liable.[8]

SECT. 6.—*Dissolution.*

A partnership may either be indefinite or for a fixed period. In the former case it is an old and universal rule, that where a partner resigns the partnership is dissolved.[9]

---

[1] B. C. i. 638, 639.—[2] Dunbar *v.* Remmington, 10th March 1810.—[3] Jenkins *v.* Blizard, 3d December 1816, 1 Stark, 418. Collyer, 369. Aytoun *v.* Dundee Bank, 19th July 1844.—[4] Sawers *v.* Tradestown V. Society, 24th February 1815. See Kemp *v.* Allan, 17th June 1824.—[5] Collyer, 312.—[6] B. C. ii. 641.—[7] Collyer, 368.—[8] Ibid. 370.—[9] Inst. iii. 26, 4.

A partner may retire without giving previous warning of his intention; and the existence of engagements with third parties for which he with the others is responsible, will not interfere with the dissolution as between the partners themselves.[1] If a partner suddenly resign, however, for the purpose of taking advantage of his knowledge of the partnership concerns in speculating for his own immediate interest, he will have to communicate his advantage as if he were still a partner, being considered as holding it in trust for the company.[2] This was exemplified where certain partners had obtained a renewal of the lease of the premises of the company without intimating to the other partners their intention to apply for it.[3]

Fixed Period.—Where the partnership is for a fixed period, it can be dissolved only by mutual consent; but "a majority may dissolve a partnership or joint trade, though undertaken for a term certain, provided the dissolution be made *bonâ fide*, and justifiable on rational grounds."[4] Thus, in a partnership regarding a ship in the Greenland whale-fishery, after two unsuccessful voyages the majority were found entitled to offer the ship for sale, and on her not selling to fit her out as a merchant ship.[5] There may be circumstances which will regulate the length of the partnership without express stipulation, but it has been held that taking a lease of premises does not bind the parties as partners during its continuance, but that the unexpired term is merely "to be dealt with as partnership property."[6]

A partnership is not dissolved by the expiry of the period to which it is limited, it is merely terminable. If the parties continue to do business as usual the partnership subsists, not for another term equal to the previous one, but indefinitely until dissolved.[7]

Death.—A partnership is dissolved by the death of one of the partners, unless it be otherwise agreed on.[8] Where it is stipulated that the representatives of a partner are to succeed to and perform his part of the contract, the obligation is binding on them like any other debt if they take up the succession. If the contract is not for a definite period, the representative can of course resign,—if it is, he can only be relieved of the responsibility on cause shown.[9] It is not

[1] Featherstonhaugh *v.* Fenwick, 1810, 17 Ves. 298. See Marshall *v.* Marshall, 26th January 1815.—[2] Collyer, 118.—[3] Featherstonhaugh, as above.—[4] B. C. ii. 633.—[5] Montgomery *v.* Forresters & Co., 17th June 1791, M. 14583.—[6] Featherstonhaugh, as above. Marshall *v.* Marshall, 23d February, 1816.—[7] Featherstonhaugh.—[8] Collyer, 69.—[9] Warner *v.* Cunninghame, 24th January 1798, M. 14603.

necessary to apprize people dealing with the partnerships of this species of dissolution, where the deceased was an acting partner.[1]

If a partner is sequestrated, or, it would appear, if he grant a trust-deed for behoof of his creditors, the partnership is dissolved.[2] The insanity or insolvency of a partner will not dissolve the partnership, but will be a good ground for judicial proceedings to obtain a dissolution.[3] The same may be said of any event happening to one of the partners "which amounts to a total and important failure in those essential points on which the success of the partnership depends."[4]

SECT. 7.—*Winding up.*

A partnership exists after its dissolution, to the extent which is necessary for merely winding up the affairs. The surviving and solvent partners are entitled to grant all discharges and other necessary deeds, and to meet the just engagements of the company, and if they commit these duties to one of their number (which is generally done), they are bound by his acts.[5] He cannot, however, bind the other partners by a document of debt, such as a bill or draft, unless he be specially empowered so to act for them.[6] A partner may insist on bringing the common stock of every description to a public sale, as the best criterion for ascertaining its value, and cannot be compelled to fix a price at which he will dispose of his own share or purchase that of his partner.[7] It would appear, however, that where the subjects are capable of beneficial division, they may be partitioned under the direction of the court.[8] The partners may have agreed to refer disputes to arbitration, but if the arbiter be not named but described (*e. g.* as the holder of a certain office for the time being), the agreement to refer will not be obligatory so as to bar an action.[9]

Division.—The creditors of the concern have a preferable claim over the common property, and after satisfying them, it comes to be divided among the partners, or to be open to the diligence of their creditors. "In taking an account between the partners themselves, the state of the stock is to be

---

[1] Christie *v.* Royal Bank, 17th May 1839.—[2] B. C. ii. 634.—[3] Ibid. Jones *v.* Noy, 19th November 1833, 2 M. & K. 125.—[4] B. C. ii. 635.—[5] Ibid. 637. Kinnear *v.* Thomson, 12th February 1830.—[6] B. C. ii. 644.—[7] Stewart *v.* Stewart, 26th November 1835.—[8] Ibid. as reported in F. C.—[9] Buchanan *v.* Muirhead, 25th June 1799, M. 14593.

taken as at the dissolution (death for instance), and the proceeds thereof until it is got in; and each is to be allowed whatever he has advanced to the partnership, and to be charged with what he has failed to bring in, or has drawn out beyond his just proportion. The partners are to be allowed equal shares of the profit and stock, if there be no other arrangement settled. But a different arrangement may be established either by contract or by the books and usage of the company."[1]

CHAPTER II.

JOINT ADVENTURE.

JOINT adventure is a species of partnership limited to a particular project. Here, as in ordinary partnership, the partners are liable for the engagements entered into by one of their body in name of the whole; but while the responsibility is, in the former case, extended to all transactions in the usual course of the business of the partnership, it is in the case of joint adventure limited to such engagements as are applicable to the particular project on hand.[2] The extent of the responsibility arising from such transactions has been thus defined:—"If all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose [responsibility] as if all the names had been announced to the seller; and, therefore, all are liable for the value of them."[3] If individuals who have purchased goods enter on a joint adventure for the disposal of them, as the sellers could have nothing but the credit of the individuals they dealt with to rely on, they have no claim against the other partners.[4] Nice distinctions may occur on the question whether the parties are carrying on a joint concern, or are only co-operating with one another, each having a separate interest. In the case of furnishing hay to horses on a particular stage of the run of a stage-coach, it was first

[1] B. C. ii. 645.—[2] Withers, Birch, & Co. v. Cowan, 16th November 1790, B. C. ii. 650.—[3] Lord Ellenborough in Gouthwaite v. Duckworth, 12 East. 421.—[4] Saville v. Robertson, 15th June 1792, 4 T. R. 720.

held that all the proprietors were liable; but as it appeared that the horsing of each stage was in the hands of individuals, the decision was altered, and it was found that the proprietors were not all jointly liable for furnishings made to one proprietor for the use of the horses drawing the coach along his part of the road.[1] A like decision has been given in a similar case in Scotland.[2] In a late case where the author of certain books, retaining the copyright, published editions on the stipulation that he was to have no risk, and that the profits were to be divided with the publisher, deducting commission to the latter, there was found to be no joint adventure in a question with parties who furnished the paper to the publisher.[3] It seems, indeed, that a party to a joint adventure may make a separate contract regarding the property or effects which are to be the object of the adventure, and that if he do so entirely in his own name, he becomes the sole debtor. Thus, where there was a joint adventure regarding the uses to which certain edifices were to be applied, a party to the adventure, who was a builder, contracted to erect them for a certain sum. Having become insolvent, it was found that the persons whom he employed in the work had no recourse against another party to the adventure.[4]

As in the case of partnership, where there are no conditions, or special circumstances, tending to define the share held by each, equality is presumed in joint adventure.[5] A mere joint *purchase* for the purpose of division, and with no view of sharing the profit and loss, is to be distinguished from joint *adventure*.

CHAPTER III.

JOINT STOCK AND PATENT COMPANIES.

SECT. 1.—*Principles generally applicable to Joint Stock Companies.*

PUBLIC companies incorporated by royal Charter or act of Parliament, possess the privileges of other Corporations.[6]

[1] Barton *v.* Hanson, 1809, 2 Camp. 97, and 2 Taunt. 49.—[2] Jardine *v.* M'Farlane, 16th February 1828. See Sherman *v.* Bain, 2d February 1839. —[3] Venables, Wilson, & Co. *v.* Wood, 8th March 1839.—[4] White *v.* M'Intyre, 12th January 1841.—[5] Ferguson *v.* Graham, 3d June 1836. —[6] E. iii. 3, 28.

As such, and as being frequently connected with the formation of railways, harbours, and other public works, a great part of this subject belongs to the department of Public Law.

Whether these exist under the authority of an act of Parliament or of a charter of incorporation, or are merely constituted by the voluntary union of the members, their constitution differs essentially from that of an ordinary partnership. The object is not so much to enable certain parties to unite their efforts for some common object, as to afford an opportunity to individuals to invest money in a project in which they have personally no administration, the management of the common stock being left to committees or official persons. Here it is not the person, but the money, that is essentially the object of the contract, and so it is a general feature in such undertakings that the shares are property, which may be succeeded to, or transferred from hand to hand. Such a body cannot, unless empowered by Act of Parliament, Charter of Incorporation, or Letters-patent, bind itself, or pursue or defend in its descriptive name (*see above*, p. 176); but it would seem that it may pursue in its descriptive name and the names of a majority of the individual partners.[1] Whether it can do so in the name of any office-bearer is questionable; but it is the received opinion that it can.[2] It has been held, however, that a prosecution by a descriptive name and that of an agent—viz. "The Clyde Shipping Company, and Robert Murray, as agent for, and for behoof of, the said Clyde Shipping Company," was incompetent.[3] It has been decided that where parties come under an obligation to a company and an office-bearer of the company or his successors, the office-bearer may pursue for fulfilment.[4]

Responsibility of Members.—It is generally the object of such companies to contract on the credit of the joint stock, without rendering the parties individually liable. No case has lately occurred to bring out the question whether this object can be attained without an act of Parliament, nor indeed can it be laid down as fixed law, that a charter of incorporation has in Scotland the effect which it has in England, of limiting the responsibility of the members, unless it be granted in terms of the act 6 Geo. IV. c. 91. A com-

[1] Shotts Iron Company, &c. *v.* Hopkirk, 19th January 1828.—[2] B. C. ii. 629.—[3] Kerr *v.* Clyde Shipping Company, 8th June 1839.—[4] Fisher *v.* Syme, 7th December 1827.

paratively old case appears to countenance the principle that partners in ordinary joint stock companies are not liable beyond their shares of subscribed stock.[1] But it is much doubted if the decision be law, or if there can be any condition created by the members of a joint stock company among themselves, by which they can deprive the creditors of the concern of the ordinary privilege of holding them all individually liable as partners.[2] It has been decided that where the responsibility is limited by act of Parliament to the amount of subscribed stock, each partner is liable to meet the debts of the company to the whole amount of his stock, and not merely according to his proportion.[3] In France it is fixed law that, by a partnership *en commandite*, the liability of a portion of the stock-holders may be limited to their amount of stock.[4] In England it is held that this privilege belongs only to corporations, and that "every member of an unincorporated trading company, no matter of what number of persons it consists, is answerable to the full extent of his private property for the whole of the debts of the company."[5] So far as can be inferred from the usual authorities, the evidence which will render a person liable as a partner of a joint stock company in England is stricter than we have warrant for holding that it would be in Scotland. Assuming management as a director, and signing the deed of settlement, are conclusive evidence of partnership, the commencement of which will be carried back to the payment of any deposit. Mere verbal accession, however, will not involve responsibility, and it is laid down in England that an individual cannot be held responsible "if he neglect to perform the conditions which enable him to share the profits," or, if the terms under which he had proposed to become a partner "are not reasonably fulfilled by the projectors," unless he have signed the deed of settlement.[6]

Where a party had signed a document agreeing to become a partner, and binding himself to subscribe the contract of copartnery as approved of at a general meeting,—he was found, on his insisting on his privileges as a partner, to be bound, though he had not subscribed the contract, by its terms, in as far as it contained a stipulation that 5 per cent.

---

[1] Stevenson *v.* Macnair, 14th February 1757, 5 Br. Sup. 340.—[2] B. C. ii. 630. Henderson on Joint Stock Companies.—[3] Malcolm *v.* West Lothian Railway, 10th June 1835.—[4] Code de Commerce, liv. i. tit. 3, § 1. —[5] Collyer, 764.—[6] Ibid. 734-743. See Wordsworth on the Law relating to Joint Stock Companies, 246, *et seq.* Walstab *v.* Spottiswoode, 12th June 1846, 15 L. I. (N. S.) 193.

interest should be charged on all unpaid calls, and that there should be no interest on dividends not called for.[1] How far a banker's receipt for deposit, or a scrip certificate, is evidence of property on the one hand entitling the holder to the benefits of a partner; and how far the obtaining such a document, by agreeing to take shares, or by purchase from another person, subjects the holder to the responsibilities of a partner, are matters still left in a state of doubt. In Scotland we have had no decisions on the point, and those which have occurred in England are not conclusive.[2] It has been sometimes supposed that transactions in scrip are invalid, but there are no decisions warranting this opinion.

Deed of Settlement.—The regulations of a joint stock company are generally embodied in the deed of settlement. This instrument "constitutes trustees of the partnership property, directors of the partnership affairs, auditors of its accounts, and such other officers as the objects of the society require, and contains covenants for the performance of their respective duties, which are specifically set out, as are those of the other partners or shareholders; it also defines the number of shares, the power and method of transferring them, and of calling for the instalments required to be made thereon; the mode of convening general meetings of proprietors, their rights when convened, and a variety of other rules suited to the exigencies of that particular undertaking."[3] It has been found that a provision in the prospectus or contract of a joint stock company that the capital shall reach a certain amount, is not a condition the nonfulfilment of which will release the subscribers, but that they are bound to pay up their shares though a smaller sum only should be subscribed.[4]

Statute.—When the concerns of the company are extensive, an act of Parliament is generally obtained, which enables the society to sue and be sued in the name of an office-bearer, and usually limits the amount of capital to be subscribed. It has been decided that, as between the partners, stipulations entered into prior to the passing of the act, and not embodied in it, are binding.[5] Of the nature of the statutes by which such public companies are constituted some notice has already been taken (*see* p. 4). In 1845, three acts

---

[1] Ballandene *v.* Glasgow Union Bank, 5th July 1839.—[2] See Jackson *v.* Cocker, 4. Beavan, 59. Walford on Railways, 30. Henderson on Joint Stock Companies, 49.—[3] Smith's M. L. 62.—[4] Turner *v.* Molison, 30th May 1833. Caledonian Dairy Company *v.* Campbell, 4th February 1834.—[5] Wishaw Railway *v.* Stewarts, 1st March 1837.

were passed, containing clauses of a general nature which must, more or less, form part of the constitution of any new companies established by act of Parliament. They are called respectively,—"The Company's Clauses Consolidation (Scotland) Act" (8 & 9 Vict. c. 17); "The Lands' Clauses Consolidation (Scotland) Act" (8 & 9 Vict. c. 19); and "The Railways Clauses Consolidation (Scotland) Act" (8 & 9 Vict. c. 33.)

The directors of a joint stock company are not in the position of agents and other mandatories, who are responsible for the possession of the requisite skill for fulfilment of their duties. They are seldom chosen for their acquaintance with the particular trade or pursuit adopted by the company, but rather on account of the reliance that is placed in their general integrity and discretion. There is usually a clause exempting them from responsibility for omissions and rendering them liable only for their own individual acts and deeds. When fortified by such a clause, there are no authorities for holding that they are personally liable beyond their responsibility as partners, for anything that does not amount to peculation, or gross breach of the contract and the constitution of the company. In the case of the Caledonian Dairy Company, there were allegations that losses had been occasioned by the directors not taking security from the stipendiary officers in terms of the contract; of their having neglected to balance books and call meetings as required by the contract, &c. Yet these were not held relevant to relieve the other members from responsibility for advances by the directors.[1] Their responsibility appears to correspond with that of trustees (*see* p. 237). They are bound to adhere to the original objects of the company. In a case where a company was organized for the purpose of carrying goods and passengers between Leith and Australia, the Directers, who were empowered to export and import goods, were found not entitled to take consignments of goods guaranteeing the price on *del credere*, or to trade at ports not intermediate between Leith and Australia.[2] For all purposes, however, connected with the legitimate ends of the establishment, such as borrowing money, the purchase and sale of property, &c., the powers of directors are very wide,[3] and it would not be easy to say where they are limited.

Transfers.—One of the main peculiarities of joint stock

---

[1] MacAlister *v.* Sommerville, 14th February 1843.—[2] Maxton *v.* Brown, 18th January 1839.—[3] Fleming *v.* Campbell, 25th June 1845.

companies is, that the right of partnership in them is an article of commerce by the transference of shares. As in ordinary partnership, there is a difference between the circumstances which will give one the privileges attached to a stock-holder, and those which will render him liable to the corresponding obligations. There are generally rules for the transference of stock, requiring not only the execution of certain writings by the parties, but the acceptance of the purchaser as a member of the firm. There are sometimes conditions—such as the payment of all the calls on the previous holder,—which are precedent to his right to derive any benefit from the stock. Yet he may have in the mean time rendered himself a partner of the company, as it was found where one had not adopted the form of transfer prescribed by the contract, yet, having intimated his purchase, it was entered in the transfer book.[1] A party may be bound as a partner, by signing the contract as trustee for another, while he has none of the advantages of a stock-holder.[2] As in other cases of sale and purchase, fraudulent representation may be a ground for annulling a sale of stock,[3] but it is very questionable if it would affect the purchaser's responsibility as a partner of the company. The transfer of shares is a piece of business in which parties are entitled to prompt arrangements, as the value of shares is apt to fluctuate, and the prospect of such fluctuation may have been a motive to the transaction. Where one party delays or refuses to perform his part, the other party seeking to preserve his recourse, should be prepared to perform his. In a case where there was an agreement for the sale of shares in a railway, and the seller would not sign the transfer until certain other stock transactions were completed, but was ready next day to complete the transfers, the purchaser *not having tendered the purchase money* was found not entitled to repudiate the transaction.[4]

In 1844, two acts were passed relating to joint stock companies in England, which, however, may have some incidental relation to Scottish companies. The 7th & 8th Vict. c. 110, is entitled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies." It applies to every "Joint Stock Company," according to what is to be so held in terms of the definitions of the act "established

[1] Turnbull *v.* Allan, 1st March 1833, affirmed 7 W. S. 281. See also Weatherley *v* Turnbull, 3d June 1824.—[2] Malcolm *v.* West Lothian Railway, 10th June 1835.—[3] Brown *v.* Syme, 8th March 1834.—[4] Wilson *v.* Watson, 21st January 1841.

in any part of the United Kingdom of Great Britain and Ireland except Scotland, *or established in Scotland, and having an office or place of business in any other part of the United Kingdom.*" The act 7 & 8 Vict. c. 3, is entitled "An act for facilitating the winding up the affairs of joint stock companies unable to meet their pecuniary engagements." It is not expressly limited to England, but as it puts in motion the machinery of the English Court of Bankruptcy, for winding up the affairs of insolvent companies, it must be presumed that it can only apply to those which are locally within the operation of the law of England. Companies comprehended under the act for the Registration of joint stock companies, as above cited, come specially within its operation. It is worthy of remark that there is a provision in the act for enforcing orders made in England, for payment of money by persons in Scotland, as partners of such a bankrupt company (§ 24). The courts in Scotland would not, however, be bound to give effect to these orders, if the proceedings in England should, through the vagueness of the local application of the act, be applied to companies that do not come properly within it.

SECT. 2.—*Companies under the Patents Act.*

To avoid those cumbrous peculiarities of a corporation which are inconvenient to a mere trading company, and to render the expense of an act of Parliament unnecessary, the legislature has provided for the limitation and regulation of the responsibility of partners by means of letters patent. These may be granted under the great seal for Scotland to individuals and their representatives, empowering them to sue and be sued through one of two registered officers, and limiting the amount of their individual responsibility to a certain sum per share.[1] The company must be constituted by a Deed of Partnership, containing its designation, object, and place of business, with the designations of the members; and appointing two officers to sue and be sued.[2] Within three months after the date of the letters patent a return of these particulars, and of the shares (as designated by their numbers) held by each individual, together with the extent of responsibility of each, must be made to the register house; and when transfers of shares are

[1] 7 Wm. IV. & 1 Vict. c. 73, §§ 2, 3, 4.—[2] Ibid. § 5.

made, a similar notice must be sent within three months.[1] No person is entitled to a share of profits, unless he be registered as a member, and each member continues to be responsible, until a return of his ceasing to be a member is registered.[2] When responsibility is limited to a certain sum per share, no action can be brought against a member for a larger sum than the unpaid balance of his subscription.[3]

SECT. 3.—*Joint Stock Banks.*

Any joint stock banking company in Scotland may sue and be sued in the name of the manager, cashier, or other principal officer, provided that before commencing business and between the 25th of May and the 25th of July annually, a return be made to the collector of stamps, of the name of the firm, of the names and designations of all the partners, of the places where branches are established, and of the office-bearer in whose name the company is to sue and be sued. The return must be made on the affidavit of that office-bearer.[4] Certified special returns must be made of any additional office-bearer appointed to represent the company, of all retiring and newly adopted partners, and of any new agencies.[5] A company delaying to make the specified return forfeits £500 per week during the delay, and if a false return is made, £500 is forfeited by the company, and £100 by the office-bearer who makes the return.[6]

The act 9 & 10 Vict. c. 75, extends the Joint Stock-banks' Act for England, of the session of 1844 (7 & 8 Vict. c. 113) to Scotland, with the provision that nothing contained in either of the acts is to deprive any creditor of his recourse against the company, or the partners, or to affect any recourse by the partners against each other, which they might have by the ordinary law of Scotland. The act is, with the exception stated below, only to extend to Banking Partnerships entered into on or after 9th August 1845.

The English act thus extended to Scotland, prohibits the formation of companies of more than six partners, for conducting the business of banking, unless in terms of letters patent granted under the act. It does not refer to companies established before the above date, unless they apply for letters patent under the act (§ 1). The Letters Patent of Incorporation are to be granted on the Report of the Board of Trade, founded on a petition from the company according

[1] 7 Wm. IV. & 1 Vict. c. 73, §§ 6, 9, 16.—[2] Ibid. §§ 20, 21.—[3] Ibid. § 24.—[4] 7 Geo. IV. c. 67, §§ 2, 3, 7.—[5] Ibid. § 6.—[6] Ibid. § 14.

to the specific directions of the act (§§ 2, 3, 6). A deed of settlement must be executed, also according to the terms of the act. It must be subscribed by the holders of a half at least of the shares on which fully 10 per cent. has been paid, before the letters patent are petitioned for; and the company must not commence business until, all the shares have been subscribed for, the deed has been signed by all the shareholders, and half the amount of each share has been paid up (§§ 4, 5). The incorporation is not to limit the ordinary legal responsibility of the shareholders (§ 7). There are certain provisions, to the effect that proceedings shall be taken against the property of the company in the first place before that of the individual partners can be affected, but these appear to be neutralized by the special clauses of the Scottish act mentioned above. There are provisions for enabling a shareholder who has been obliged to meet any of the liabilities of the company, to partition the payment among the other partners, and to make a second distribution in case of bankruptcies among them (§§ 10-15). The bank must make an annual "memorial," containing certain specified particulars, to the Commissioners of Stamps and Taxes. Special memorials are to be made when changes occur in the partnerships, and any person whose name appears in the last existing memorial is liable as a shareholder (§§ 17-21). There is a form in the act which may be used for transfers, and all transfers must be registered in a "Register of Transfers." No member is entitled to transfer his shares till he has paid all calls on them (§§ 23, 24). The payment of calls is enforceable by action, and by forfeiture and sale of the shares, sanctioned by a general meeting (§§ 33-39).

PART VII.

CONTRACT OF INSURANCE.

Insurance is a contract by which one party, in consideration of a sum of money or Premium, engages to indemnify another for the loss, if it should take place, of property or life, occurring in certain specified or understood circumstances; the extent of the indemnity being settled by stipulation, or depending on the general laws applicable to the contract. It is a species of speculation in which capital is embarked for the purpose of equalizing the effects of accidents, the one party speculating on the general average profit which the limited number of such accidents may leave him, and the other obviating the effect of a sudden calamity by a temporary sacrifice. The deed by which the contract of insurance is created is termed a Policy. The three staple classes of this contract are, Marine, Fire, and Life Insurance. It is gradually, however, becoming extended to other risks, such as that of official fraud or negligence, an insurance company taking on itself, for an average premium, the risk of cautionary for faithful performance, as described in *Part* VIII. *Chap.* II. *Sect.* 4.

CHAPTER I.

Marine Insurance.

Sect. 1.—*Nature and Requisites.*

In marine insurance the person who insures is termed the Underwriter, from his writing his name under the sum for which he will stand good. The insurance is generally negotiated by a Broker or middleman. Capitalists who are ready to underwrite, invest their brokers with authority to incur

risks for them; and the merchant or shipowner who wishes to insure, is thus enabled, by applying to the broker, to get his insurance negotiated without delay.[1] The broker is in the situation of debtor and creditor with both parties. To the credit of the underwriter he puts down premiums, which he credits as cash, undertaking the risk of recovering them; and in periodical accounts he may balance against these, returned premiums and losses. Against the insured he debits the premium, and credits an insured loss or a return premium.[2] In England the right of companies to insure was long limited to the two companies erected by royal charter —the Royal Exchange, and the London Insurance Company—but this monopoly was abolished by 5 Geo. IV. c. 114; it did not extend to Scotland.

Interest.—There must be an insurable interest. By the act for suppressing wager policies, no insurance "on any ship belonging to his majesty or any of his subjects, or any goods, merchandise, or effects" can be made, "interest or no interest, or without farther proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer."[3] An insurable interest does not require to be a direct right of property; it may be in expected profit or freight, or an interest in a bottomry or respondentia bond. Under the head of freight an owner may insure the benefit he derives by the conveyance of his own goods.[4] Seamen's wages are not insurable, on the principle that their hopes of remuneration should be solely based on the safety of the ship. The prohibition does not extend to the remuneration of the master.[5] It is a general principle that no insurance is good where the subject-matter of the contract involves a breach of law. (*See above*, p. 128.)[6] All parties connected with an insurance on smuggled goods forfeit £500.[7]

SECT. 2.—*Policy and Slip.*

Previously to preparing the policy, a note or jotting of the contract is made out, signed by initials, and merely used for noting the extent to which the respective underwriters will undertake. This is technically termed a "slip." Although a document of considerable consequence commercially, it is questionable whether, not being stamped, it would afford

---

[1] See B. C. i. 599. M'Culloch's Commercial Dictionary, article Broker. —[2] Marshall, 295, *et seq.*—[3] 19 Geo. II. c. 37, § 1.—[4] Marshall, 101, *et seq.* Park, 13, 69.—[5] Park, 12.—[6] Marshall, 52.—[7] 8 & 9 Vict. c. 87, § 48.

ground for an action to compel the underwriter to sign the policy, and certainly cannot stand in its stead.[1]

Stamp.—A policy must be stamped according to the terms of 55 Geo. III. c. 184, 3 & 4 Wm. IV. c. 23, and 7 & 8 Vict. c. 21. "Any alteration which may lawfully be made in the terms and conditions of any policy of insurance duly stamped" may be made after it is underwritten, provided the alteration be made before notice of the termination of the original risk, that the subject insured remain the property of the same person, that no additional sum be insured, and that the period insured for be not prolonged.[2] Under this condition a memorandum allowing the vessel to return and unload may be introduced,[3] and the time of sailing may be extended.[4] It is liberally interpreted where mistakes are corrected, and so where a broker had by mistake effected a policy on "ship," the word was allowed to be altered to "goods," but where a policy was designedly underwritten "on ship and outfit," it could not be altered to "ship and goods" without a new stamp.[5] Any party accessory to insurance transactions, in which the stamp laws are evaded, is liable to a penalty of £100.[6] It was a rule clearly established that policies could not be stamped after being written.[7] As to the doubt which the late act appears to have thrown on this law, *see above*, p. 143.

Contents.—The policy must contain the name or firm of the insured, or otherwise of the consigner, or of the consignee, or of the person in Britain receiving the order to insure or effecting the insurance, or of the person who gave him directions to do so.[8] It must contain the name of the ship and of the master, and a discrepancy tending to produce a misunderstanding on these points will vitiate the contract, but the insurance may be generally "on ship or ships." It must contain the subjects insured distinctly described by the usual commercial terms. The commencement and termination of the voyage must be stated, and the endurance of the risk, the places of departure and destination being specified. A blank as to either of the places vitiates the contract, but it is said that if no time is specified, the risk begins with the date of the policy. The expressions "*at and from*" the

---

[1] B. C. i. 603. Marshall, 347. See 7 & 8 Vict. c. 21, § 4.—[2] 35 Geo. III. c. 63, § 18. 7 & 8 Vict. c. 21, § 3.—[3] Weir *v.* Aberdeen, 2 Barn. and Ald. 320.—[4] Kensington *v.* Inglis, 8 East. 273.—[5] Smith's M. L. 335.—[6] 7 & 8 Vict. c. 21, § 4.—[7] 34 Geo. III. c. 63, § 14. See 7 & 8 Vict. c. 21, § 5.—[8] 28 Geo. III. c. 56.

loading port renders the underwriter liable while the vessel remains in port, and throws a corresponding obligation on the insured, that she is in port, or will soon be there in safety.[1]

The risks or perils insured against are stated in the policy. They are, in the first place, those casualties occasioned by the "act of God and the king's enemies," for the consequence of which the shipowners are not responsible.* They are enumerated as perils of the Sea, Fire, Enemies, Pirates, Jettison or the necessary throwing overboard of property,† Detainments, and Embargoes. They may extend to *Barratry*, or loss by the fraud of the master and crew, though these be appointed by the assured;[2] and in a case where the master was part owner, and was charged with having scuttled the ship, this did not prevent another part owner from recovering for the loss.[3] The specific perils are followed by a general clause, including "all other perils, losses, or misfortunes," &c. It is a general principle, in interpreting this and the other clauses, that no loss arising from the fault of the owners, or from the unseaworthiness of the vessel, whether known to them or not, comes within the risks insured against; and that no loss arising from the fault of those employed by the owners comes within the risks, unless it be specifically mentioned.[4]

Usual Memorandum.—At the termination it is the practice to insert a memorandum, termed the Usual Memorandum, by which certain destructible commodities (generally corn, fish, salt, fruit, flour, and seed) are excepted from partial loss, and others (generally sugar, tobacco, hemp, flax, hides, and skins) are excepted from partial loss above five per cent. The object of this clause is to avoid disputes regarding petty losses; but to preserve the underwriter's responsibility for a general loss, there are the words "unless general," followed in some policies by "or the ship be stranded." It having been decided, however, that in consequence of the latter alternative, if the ship *were* stranded, the underwriters became responsible for partial loss, though not occasioned by the stranding, the London and Royal Exchange Insurance Companies ceased to insert this reservation.[5]

There are two specific sorts of policy, *Valued* Policy and *Open* Policy. In the former, the value insured is inserted

---

[1] Marshall, 319, *et seq.* Park, 32, *et seq.*—* See below, p. 277.—† See p. 280.—[2] Marshall, 207, *et seq.* Smith's M. L. 323, 324.—[3] Strong *v.* Martin, 11th July 1839.—[4] Marshall, 234, *et seq.*—[5] Ibid. 224. Smith's M. L. 298.

in the policy as admitted by the underwriter, in the latter it will have to be proved in the event of a loss. In the case of total loss or abandonment, the amount in a valued policy is considered the adjustment of the value as between the parties, but it cannot be made a shield for fraud, or for infringing the 19th Geo. II. c. 37, which prohibits insurances by persons who have no interest in the thing insured. Where the loss is partial, the distinction is not available, the amount of the damage necessarily becoming a subject of proof, as much as in the case of an open policy.

The loss to be made good by the underwriter is divided into two sorts, *total*, and *partial* or *average*, and which of these it is to be, depends sometimes on those having the management of the ship. (*See* p. 203.)

SECT. 3.—*Premium.*

The Premium is the consideration for which the underwriter undertakes the risk. It is in this peculiar position, that the receipt is acknowledged in the policy, while the money remains unpaid, and the assured is legally responsible for it. It is, however, to the broker that he is responsible, not to the underwriter, whose acknowledgment is conclusive evidence of payment as between the assured and himself.[1] In the account between the broker and the assured the unpaid premium is debited, while in his account with the underwriter it is credited.[2]

Return.—The risk is the consideration of the premium. If it have not been incurred, an unpaid premium is not due, and a premium paid must be returned. If without any intention of fraud, or of transacting a wager-policy, an insurance has been obtained in favour of one who has no interest, or to an extent far beyond the real interest, there will be a partial or total return.[3] If the same interest is in a similar manner insured in more than one office, there will be a proportional return from each.[4] It would appear, that even in a wager-policy the premium may be recovered before the risk is run, though not afterwards. If, however, there be a loss which the underwriter refuses to make good on the ground of want of interest, and it appear that the assured was not acting fraudulently, there must be a return.[5] If real risk has been incurred, that is, if the subject insured have been

[1] Dalzell *v.* Mair, 1808, 1 Camp. 532.—[2] B. C. i. 599.—[3] Marshall, 648.—[4] Ibid.—[5] Ibid. 650-652.

for one moment so situated, that if a loss had occurred, the whole would have fallen on the underwriter, there can be no return; and so if the ship deviate from her course, and the underwriter be discharged, he retains the premium.[1]

SECT. 4.—*Obligations on the Assured.*

Those departures from the obligations of the assured, which will ground a defence against a claim on the underwriters, come under the three heads of breach of warranty, deviation, and concealment or misrepresentation.

Warranty.—It is an invariable rule, derived from the principles which have regulated the contract of insurance in England, that breach of warranty on the part of the assured releases the underwriter, whether it have been knowingly and wilfully incurred or not, and whether it affect the nature of the risk or not.[2] "It is perfectly immaterial for what view the warranty was introduced; or whether the party had any view at all; but being once inserted it becomes a binding condition on the insured."[3] Warranties are express or implied; of the former class are generally these:—That the ship is safe on a particular day; that she is to sail on a particular day; that she is to sail with convoy; and that she is to commit no breach of neutrality.[4] A distinction is taken between a warranty to sail and a warranty to depart. In the former, the ship has only to break ground, and it is of no consequence that she may have put back from stress of weather. In the latter, the ship must clear out of port, and fairly commence her voyage.[5]

The principal implied warranty is Seaworthiness, as to the general rules of which see the liabilities of ship-owners (*Part* X. *Chap.* II. *Sect.* 6); observing that with them it is of the nature of an obligation, here of an absolute warranty, as above explained. Where there is no express evidence against it, seaworthiness is presumed;[6] but this may be met by a counter presumption arising from circumstances, such as that of inability to perform the voyage being evinced soon after the ship has sailed.[7] Warranty that the ship shall be possessed of the requisite papers, and that she shall be navigated according to law and the rules of good seaman-

[1] Park, 575.—[2] Smith's M. L. 334.—[3] Park, 660.—[4] Marshall, 353.—[5] Moir v. Royal Exchange Company, 5 M. & S. 460.—[6] M'Closkie v. Glasgow, &c. Insurance Company, 4th August 1843.—[7] Chief Commissioner Adam in Cairns v. Kippen, 17th March 1820, 2 Mur. 256.

ship, are, properly speaking, part of the warranty of seaworthiness.

Deviation.—That the ship shall not deviate from the prescribed or from the usual course may be termed an implied promissory warranty. From the moment when the deviation takes place the underwriter ceases to be responsible, though it should be proved that the loss arose from circumstances totally independent of the deviation, and that it would have been occasioned had there been no deviation.[1] The liability does not cease until the vessel has reached the point of departure, and so, if there be a loss before that event, the underwriter will be liable, though plans for a departure had been formed.[2] Deviation will be justified by stress of weather, flight from an enemy, the necessity of repairs, mutiny of the crew, and the intention to succour a ship in distress.[3]

Misrepresentation, &c.—It is difficult to define the sort of misrepresentation or concealment which will release the underwriter, for the result depends, not, as in the case of warranty, on the simple breach, but on the effect produced by it on the risk. The most important point, where the question comes to an issue, will always be, whether, in the one case, wrong information has induced the underwriter to undertake the risk, or, in the other, a fact has been concealed from him, his knowledge of which would have prevented him from undertaking it. But it will not vindicate a misrepresentation, that the amount of risk, which may be presumed to be incurred, is not increased by the misrepresentation, if the particular risk represented is not the risk incurred; and so a wilful misstatement as to the day of sailing, or even as to the day when the ship is *expected* to be ready to sail, vitiates the contract.[4] Misrepresentation as to sailing with convoy will be fatal, and was held so even in a case where there was an alternative of sailing with convoy or running the ship, it having been determined beforehand that she should be run. The merit of the decision stood on this, that the underwriter was given to understand that there was a chance of the ship sailing with convoy when there was no such chance.[5]

SECT. 5.—*Loss, Abandonment, and Adjustment.*

Loss is of two kinds, *Total* and *Partial*.—Where the subject insured has entirely disappeared, as by the sinking of

[1] Marshall, 177.—[2] Ibid. 195.—[3] Marshall, 198-206.—[4] Stewart *v.* Morison, 19th January 1776, M. 7080.—[5] Reid *v.* Harvey, 24th June 1816, App. 4 Dow, 97.

the ship, the loss of course comes under the denomination *total*. But where the object of the voyage is defeated, where the goods or vessel are so far damaged as to be of no value to the owner, or where the prosecuting the voyage, or getting the cargo brought to port, would be, in consequence of the damage from sea-risk previously suffered, so expensive that it would not be worth the owner's while to run the risk, and in similar cases,—the loss is considered total, if the assured abandon the subject to the underwriters.[1] In general, in the case of a vessel, the question whether she be worth repairing and putting to use, or be only fit to be broken up and sold in fragments, will correspond with the question whether the loss is to be held partial or total; and it is held that the question whether she may be profitably repaired, is to be considered with reference to the market-value of the vessel when so repaired—not to the sum at which she is valued in the policy.[2] This practice, by which the ship and its accessories are left, by the persons who have projected the undertaking, and must be presumed in the situation to make the best use of it,—to persons whose opportunities of turning them to account must be in the general case inferior, is one liable to great abuses, and it has accordingly been the practice of the courts to limit the privilege to cases as nearly as possible of absolute necessity.[3] There must not be undue delay in warning the underwriters, but "within the description of a reasonable time for notice is included the opportunity of fully understanding the condition in which the goods are."[4] So the master of the ship having arrived on the 25th April, and the ship's papers on 3d May, notice was held to have been timeously given on the 5th.[5] The persons interested will generally hold a conference with the underwriters by meetings or otherwise, and if the underwriters do not, within a reasonable time, state their intention to oppose the abandonment, they will be barred by acquiescence. So it was held where more than two months had been allowed to elapse.[6]

Partial loss may be defined as such loss from the usual perils as will not justify abandonment. It includes damage done by storms, stranding, accidental collision, lightning, plunder by an enemy, &c. "Losses incurred while the ship is running before the wind, or lying to the sea, are losses by

---

[1] Marshall, 564.—[2] Stewart *v.* Greenock Marine Insurance Company, 11th January 1844.—[3] Ibid. 565, *et seq.*—[4] B. C. i. 611. See Marshall, 600, *et seq.*—[5] Read *v.* Bonham, 29th November 1821, 3 Brod. & Bing. 147.—[6] Hudson *v.* Harrison, 20th November 1821, 3 Brod. & Bing. 97.

perils of the sea, because there is at such time no command over the ship."[1] A total loss may be converted into a partial one, as in the case of capture and recapture.

Where a total loss happens under a valued policy, the sum specified is presumed to be the value, leaving to the underwriter to prove fraud if there have been any.[2] In the case of a partial loss, or of a total loss under an open policy, the assured must prove the amount of the loss according to certain general rules. The ship and outfit are to be valued as at the port whence the voyage commenced, the cargo is to be valued at the cost or invoice price with charges, and the freight if insured will be calculated as the freight chargeable for the cargo on board. The premium and cost of the insurance are added, and in the case of a ship the expense of repairs, the value of furniture, provisions, and stores, money advanced to the sailors, &c. It is usual to deduct one-third from the price of the new materials and labour, in estimating the expense of repairs to the ship.[3]

Adjustment.—In adjusting the loss of cargo two methods are followed,—one, by taking the invoice price as above, and deducting the net produce of the sale of the damaged goods. This is technically called Salvage loss. The other mode, and that generally followed when the goods arrive at port, is to strike the difference between the produce of sales of the damaged goods, and what would have been their market price if they were sound. The amount to be paid will then be a sum bearing that proportion to the prime cost, which the difference between the proceeds of the sale, and the market price, bears to the market price.[4] By this arrangement it is the merchant and not the underwriter who is affected by oscillations in the market. It is from the gross not the net price at the port of delivery that the calculations are made.[5]

Evidence.—It is incumbent on the claimant on the policy to bring proof of loss. In the case of a total loss it will often be quite impossible for him to lead distinct evidence of the circumstances, and all that is requisite seems to be, a proof of circumstances which show, that to all human probability there has been a loss. So it having been proved in 1826 that a vessel had sailed in April 1821, that she had not arrived at her destination, and that there was a report that she had foundered at sea, but that the crew had been saved,

[1] B. C. i. 612.—[2] Marshall, 629. Stewart *v.* Greenock Insurance Company, 11th January 1844.—[3] Ibid. 633.—[4] Ibid. 638. B. C. i. 614. See M'Culloch's Commercial Dictionary, article Adjustment.—[5] Marshall, 638.

—this was held apparent evidence of the loss to go to a jury, and it was not found incumbent on the plaintiff to call any of the crew, or show that he was unable to produce them.[1] The testimony of witnesses connected with the vessel, not interested in the event, will be evidence. The log-book and protests by the master after loss, are not, properly speaking, evidence; but, as they must be produced to the underwriters, their conformity with the evidence will have to a certain extent the effect of confirming it.[2]

CHAPTER II.

INSURANCE AGAINST FIRE.

IN the insurance against fire the underwriter undertakes to indemnify the assured for loss occasioned by fire, to a limited extent, within a given period, to certain defined property, such as a dwelling-house, warehouse, furniture, stock, &c. It will be necessary to state only the points on which this contract differs from that of marine insurance, and the characteristics necessarily peculiar to itself. The transaction is not in use to be managed by brokers, as in the case of marine insurance, and the premium is payable in advance. A policy written and on stamp (except in the case of farm-stocking, in which by 3 & 4 Wm. IV. c. 23, there is an exemption from stamps) is necessary to complete the contract; but in this sort of insurance it is said that the terms may be so conclusively fixed before they are committed to writing as to be a ground for compelling the underwriter to grant a written policy after the loss has been sustained.[3] In one case where the risk was not an ordinary one, and the amount of premium had not been fixed, these defects were held to keep the contract open.[4]

Interest.—It is a statutory requisite that there should be an interest;[5] but it is not necessary that it should be that of proprietor; a creditor, trustee, or depositary, may insure, " and probably a pawnee, depositary, or common carrier, may legally insure their respective interests, subject to the rules

[1] Koster v Reed. 6 Barn. & Cres. 19.—[2] B. C. i. 612.—[3] B. C. i. 625.—[4] Christie v. North British Insurance Company, 10th February 1825.—[5] 14 Geo. III. c. 48, § 1.

of the different offices, by most of which the nature of the property insured is to be specified."[1] Where a warehouse-keeper effected a policy on goods in his warehouse, "his own, in trust, or on commission," action was admitted, at the instance of the warehouseman and the proprietor of wheat consumed in the premises.[2]

The policy expires at the term specified. It is generally renewable by an annual payment of, and receipt for, the premium. A period of fifteen days is usually permitted by the terms of the policy for renewal.

Misrepresentation, Warranty, &c.—In this description of insurance, misrepresentation, concealment, and breach of warranty, have the same effect as in marine insurance in rendering the policy void. "A representation is said to be *material* when it communicates any fact or circumstance which may reasonably be supposed to influence the judgment of the underwriters in undertaking the risk or calculating the premium; and whatever may be the form of expression used by the insured or his agent in making a representation, if it have the effect of imposing upon or misleading the underwriter, it will be *material*, and fatal to the contract."[3] An instance of concealment of a material circumstance occurred in England, where one insured a warehouse, separated by only one building from a boat-builder's establishment which had been burnt down. The fire was believed to be extinguished; but the apprehension of the assured was such that he employed individuals to watch the premises. The fire broke out again after an interval of two days: it was found that the assured could not recover on the policy.[4] The distinction between representation and warranty holds, as in marine insurance, viz. that the former, if erroneous, only vitiates the contract on its merits, while breach of warranty renders the policy void. Insurable premises are generally divided into classes, the class being mentioned in the policy. In such a case, an erroneous statement of class is breach of warranty.[5]

Loss.—The term "fire" applies only to the actual ignition or burning of something which ought not to be on fire; it will not cover damage from heat. It is not necessary, however, that the subject destroyed be actually burned; it is sufficient that injury have been occasioned by the fire, though

[1] Ellis on Fire and Life Insurance, 22.—[2] Donaldson *v.* Manchester Insurance Company, 2d March 1836.—[3] Ellis, 29, 30.—[4] Bufe *v.* Turner, 9th November 1815, 6 Taunt. 338.—[5] Newcastle Insurance Company *v.* Macmorran, 10th July 1815, App. 3 Dow, 255.

it have taken place in a building separate from the premises insured, as in the case where a house insured had been injured by the falling of the gable of another house, in consequence of a fire in that house, the gable having stood for two days after the fire was extinguished, and having fallen in consequence of operations on it by order of the Dean of Guild.[1] By the printed proposals, the insured is generally required, "1st, To give immediate notice of the fire; 2d, To deliver in as particular an account of his loss as the case will admit, and to make proof thereof, by his oath or affirmation, by books of accounts, and such vouchers as remain; 3d, To produce a certificate by ministers and church-wardens, and other respectable persons, of the character and circumstances of the sufferer, and their belief that the damage occasioned has been suffered by him."[2] But though the omission of any of these may raise presumptions against the sufferer, Professor Bell thinks it very questionable how far, especially in the case of the last, the omission can be brought to bear against the claim on the policy. In England, however, it has been decided, that if such conditions are in the policy, they are of the nature of warranties, which must be absolutely complied with, and that where a minister wrongfully refuses such a certificate, there is no remedy.[3] No insured person can recover more than to the amount of his loss; and so if he have insured in more than one office, in each to the full amount, they will have to contribute according to their proportions. There is no Abandonment in fire insurance; and therefore the policy is always in the situation of an Open and not of a Valued one (*see above*, p. 199), the sum stated in it being taken as the greatest extent to which the insurer is liable. In a loss, then, the proper compensation would seem to be, the difference between the market value of the property before and after the accident; and so it was held, in a policy on machinery, where the sum covered by the policy exceeded the market value.[4] Losses by "invasion, foreign enemy, and any military or usurped power whatsoever," are generally excepted from the risks. Such a clause will not exclude destruction caused by a riot or popular outbreak; if not accomplished by foreign enemies, it must be by persons carrying on an organized rebellion or civil war. Some companies, however, relieve themselves from all such

[1] Johnston *v.* West of Scotland Insurance Company, 25th November 1828.—[2] B. C. i. 628.—[3] Smith's M. L. 378. Ellis, 62.—[4] Hercules Insurance Company *v.* Hunter, 27th July 1836.

risks, by the farther expressions, " riot, tumult, or civil commotion."[1]

CHAPTER III.

LIFE INSURANCE.

SECT. 1.—*Policy and Interest.*

LIFE INSURANCES are generally used for the purposes of securities to creditors, or for a provision to the family of the insurer after his death. The premium may be a single or a periodical payment, or both, and the return in the event of death may be a single payment or an annuity. Purchasing an annuity in consideration of a sum paid by the annuitant, a sort of converse of this contract, often receives the same name, and is generally contracted for by the same offices. There is another description of insurance, in the sale of deferred annuities for small periodical payments, enabling those whose income depends on their labour to provide for contingencies and old age by the appropriation of a portion of their regular earnings.

Interest.—If the policy is not on the insurer's own life, there must be a pecuniary interest,[2] and where this was wanting, an insurance by a father on the life of his son was found void.[3] It has to be observed, that questions as to the necessary extent of interest are of rare occurrence in our courts. The various insurance offices have their different practices, which they generally announce to their customers, and as they usually wish to be favourably known to the public, they seldom intrench themselves within the strict rules of law, unless the conduct of the claimant be evidently fraudulent. Insurances, where there is no legal interest, are of daily occurrence, especially between near relations. Mr Ellis says, he " has seen a policy effected by a mother upon a son's life, the interest being no other than that he lived with her, and contributed largely to the expenses of housekeeping. So, upon the life of a creditor who forbore to call in the debt, but which was likely to be called in by his personal representatives at his death."[4] There are two ways

[1] Ellis, 41, *et seq.*—[2] 14 Geo. III. c. 48, § 1.—[3] Halford *v.* Kymer, 1830, 10 Barn. & Cres. 724.—[4] Ellis on Fire and Life Insurance, 123.

by which an insurance may serve as a fund of credit. The debtor may insure his own life, and assign the policy to the creditor, in which case when the debt is paid, the policy reverts to the insurer, and may again be used for a similar purpose; or otherwise the creditor may himself insure the debtor's life. The policy in the latter case is only available in as far as the debt is unpaid, as occurred in the case of Mr Pitt's coachmaker, who had insured that statesman's life for £500, and, along with his other creditors, was paid by a parliamentary grant.[1] The validity of the policy is not affected by the creditor holding other securities for his debt; but undoubtedly he cannot, through the united efficacy of the securities and the insurance, obtain more than payment.[2] It will be very clear that the more advantageous form of transacting an insurance as security to a creditor, is the assignment of an insurance by the debtor on his own life, as, where the insurance is in the name of the creditor, it has its existence in the debt, and ceases when that is paid; "hence, it necessarily follows that a party incurs a risk in keeping up such a policy after he has recovered full satisfaction of the debt or loan it was intended to secure; but there are some offices (and among them the Pelican) who, even in these cases, will purchase the interest under the policy, with the full knowledge that such interest has entirely ceased, or will sanction the continuance of the assurance for the benefit of the party interested."[3]

There are often exceptions from the risk grounded on the manner of the death, especially when the insurance is on the life of the holder of the policy. These generally include—death by the hands of justice, suicide, or duelling. Where there was no condition, a policy in England was held in the first place not to be void by the insured having been executed for felony, but this was reversed on grounds of public policy.[4]

SECT. 2.—*Obligations on the Assured.*

It is a usual warranty or stipulation in a policy, that the assured shall not travel by sea except in decked vessels, or travel beyond certain limits, or engage in the military or naval service. In some offices, it is stipulated that the policy shall be void by the breach. In others which undertake extra risks, it becomes void, if the intention be not commu-

[1] Godsall *v.* Boldero, 9 East. 72.—[2] B. C. i. 630. Blayney on Life Insurance, 56.—[3] Blayney, 62.—[4] Bolland *v.* Amicable Insurance Company, 1830, 4 Bligh, N. S. 194.

nicated to the office, and an additional premium paid. Very nice points will often arise on the representation and warranty of a life insurance. (*See above, Marine Insurance*, p. 201.) The truth of the statement of age will be ascertainable like most ordinary facts, but it is generally part of the declaration that the insured has no disorder tending to shorten life, and to decide on the truth of this may be a task of difficulty to a jury, especially as the statement has generally to be taken in conjunction with the examination and opinion of a physician. The declaration does not imply that the insured is free from all disease, "provided he be in a reasonably good state of health, in so far as belongs to the calculation of his probable existence, so that his life is fairly insurable on the common terms."[1] Diseases, therefore, which however formidable, cannot be said to damage the constitution, and mark out the patient as on his way to the grave, are not held as among those which tend to shorten life. Any of those complaints, however, arising from disease of the spine, the heart, or the lungs, which, though they may give the patient a tolerably long reprieve, constitute the seeds of dissolution, come undoubtedly within the warranty. Even if it could be shown that there was no reason to anticipate death within the average duration of human life, it is sufficient that the insurers are foreclosed from the chance of the assured having a life of very long duration.

Besides this general warranty, the insurance offices usually demand specific warranties on the subject of particular diseases. When there are no questions put, the insurer is entitled to no warranty,—he must take the circumstances as he finds them; but in such a case, if the other party misrepresent or conceal circumstances materially affecting the risk, there can be no claim on the policy. A reference is generally required to, and sometimes a certificate from, the usual medical attendant; and where such a certificate was given not by a medical man who had attended the assured on the occasion of a recent illness, but by one who had been employed at a former period, the policy was bad.[2]

It would appear that the absence of fraudulent design will not always obviate the effects of concealment, and that it is the duty of the person negotiating a policy to make careful inquiry as to all material facts;[3] nor will it justify the concealment that a party believed a particular circumstance as to his health to be immaterial if it be really a material one.[4]

[1] B. C. i. 631.—[2] Morrison v. Muspratt, 1827, 4 Bing. 60.—[3] Blayney, 50. —[4] Ellis, 111.

It is held however that the declaration which the party insured makes as to health, is a warranty only in so far as he knows or has any reasonable belief regarding the state of his own health, and that if he die of any latent disease, of which he did not know and could not tell any symptoms, and which can only be known to have existed by opening the body after death, the policy will not be invalidated.[1] It has been held that it is for a jury to consider whether a practice of opium-eating is carried to such excess as to make the omission to state it, in answer to the usual question whether there be any thing to render the insurance more than usually hazardous, a material omission.[2] In England it was held that where a person who obtained an insurance on the life of another, concealed the disorder of which he died, the former was affected by the concealment, although he was ignorant of the existence of the complaint.[3] A similar point was left an open question in a case which occurred in Scotland.[4]

[1] Hutchison *v.* National Loan Fund, 21st February 1845.—[2] Forbes *v.* Edinburgh Life Assurance Company, 9th March 1832.—[3] Maynard *v.* Rhodes, 1824, 5 Dowl. and Ryl. 266.—[4] Forbes, &c. *ut supra.*

PART VIII.

CONTRACTS OF SURETISHIP.

CHAPTER I.

General Rules applicable to the Contract of Surety.

Sect. 1.—*Nature and Constitution.*

Cautionary obligations were invented for the purpose of enabling one man to be responsible that another shall fulfil a certain obligation, and so of giving the person entitled to demand fulfilment of it a better chance of its being performed. Where the obligation is for the payment of money, the cautioner generally takes on himself the literal performance if the original creditor should fail; where the obligation is to perform or not to perform a certain act, the cautionary obligation can only be accomplished by the stipulation on the part of the cautioner to pay a certain penalty, in the case of breach of agreement on the part of the original party. In England the latter species of obligation is accomplished by the surety granting a bond under seal for a specific sum, the obligation becoming void if the principal party shall perform certain stipulations.

In Scotland cautionary obligations of every description may be accomplished by writings, which must be executed according to the statutory formalities, unless the subject-matter make them privileged. (*See above*, p. 140.)[1] In England all obligations "to answer for the debt, default, or miscarriage of another person," come within the statute of frauds, and must be in writing.[2] It is stated as a general rule of law in Scotland, that cautionary obligations must be in writing.[3] In

---

[1] Br. St. 924.—[2] 29 C. II. c. 3, § 4.—[3] B. P. 249.

both parts of the empire, however, there has been a series of exceptions, chiefly in those cases where credit has been given in virtue of parole representation, and the practice has been carried somewhat farther in Scotland than in England. (*See below*, p. 219.)

A cautionary obligation is merely an accessory to a principal obligation, which it cannot exceed in extent though it may fall short of it. Where there is no principal debtor there can be no cautioner.[1] The cautionary obligation, however, may exist where legal defences can be pleaded against the original obligation, *e. g.* that it is not properly attested, that it is granted by a minor without consent of his curators, &c.[2] Indeed, some defence pleadable by the original obligant may have constituted the reason why a cautionary obligation is had recourse to.

A proper cautionary obligation does not exist as a deed immediately exigible against the cautioner until the original debtor has failed in performance. To increase the facilities on the part of the creditor, however, it is not unusual for the cautioner to appear on the face of the obligation as a primary obligant, and if he do so, he will stand precisely in that position as regards the creditor, while in all questions between himself and the original debtor, or between himself and a co-cautioner aware of the arrangement, he will be in the position of an ordinary surety. In such a case the cautioner has the benefit of relief, but not of discussion.[3] (*See next Section.*)

SECT. 2.—*Liabilities and Privileges of Sureties.*

Discussion—An ordinary cautioner has the benefit of discussion, or a right to see it established that the original debtor will not perform the obligation before he can himself be called on to fulfil it. It is not sufficient that the creditor have called on the debtor to pay, he must have made a judicial demand. It is not however necessary that the demand should be enforced by execution against the debtor's person or goods.[4] It would appear to be sufficient that an execution of charge have been registered under the new form. (See Index, *Diligence.*) Discussion will be considered as having taken place if the principal debtor has left the country, leaving no effects behind him, or has become bankrupt.[5]

---

[1] E. iii. 3, 64. Ross v. Greig, 11th Feb. 1834.—[2] E. iii. 3, 64.—[3] Ibid.—[4] E. iii. 3, 61.—[5] B. P. 253.

If the creditor has any security over the property of the principal debtor by bond, pledge, retention, or compensation, the cautioner can insist on its being made use of before he himself is compelled to perform the obligation, or on its being conveyed to him if he consent to pay. But to make the cautioner's right to benefit by the security undoubted, 1*st*, It must be applicable only to the same obligation which the cautioner has undertaken; or, 2*d*, There must be no debt which it can be employed in the liquidation of. If the security is general, and there are other debts between the parties, the creditor will, in the ordinary case, be entitled to apply the security to those debts for which the cautioner is not bound.[1] In the case of heritable securities, however, which the subjects are insufficient to liquidate, it has been found that when there is a cautioner to the earlier security, and a subsequent security is transacted between the same parties, the creditor is not entitled to prefer the subsequent security, so as to throw the payment of the previous one on the cautioner, and that the cautioner, if he have paid the debt, is entitled to an assignation to the preferable security.[2]

Relief.—If the cautioner pays the debt, he is placed in the situation of creditor to the original debtor. His right to indemnification is termed right to Relief. It commences when he is judicially called on to pay the debt.[3] The cautioner has a claim of relief for all expenses incurred in relation to the satisfaction of the claim, but not those to which he may have himself given rise, as by negligence or injudicious litigation.[4] Where the cautioner had paid up the cash-credit of a firm of which his son was a member, he was found to have no relief against another partner, as the drafts were made by the son to pay his own individual debts to the father.[5] "When a cautioner is distressed by an action, he ought to intimate this to the principal debtor, that he may state or suggest the proper defence; and if the cautioner should neglect to do so, and should omit the proper defence, he cannot claim relief from the debtor."[6]

When there is more than one cautioner, each may be ultimately liable for the whole, unless a particular amount of liability be specially reserved for some of them. But each has, 1*st*, The benefit of division, by which, if his co-cautioners are solvent, he can insist on their paying their respective

---

[1] B. C. i. 348.—[2] Sligo *v.* Menzies, 18th July 1840.—[3] M. St. cxiii.—[4] Ibid. cxiv.—[5] Erskine *v.* Cormack, 5th July 1842.—[6] M. St. cxiv.

shares; and, 2*d*, If he pay the debt, he has a claim to be reimbursed by his co-cautioners to the extent of their respective shares. A co-cautioner having paid his own share, and being threatened with diligence for the remainder, may raise action against his colleagues to pay *their* shares; and it would appear that if he be threatened with diligence for the whole debt, though he have not paid his own share, he may bring an action for relief.[1]

A co-cautioner must communicate to his colleague the benefit of any deduction that may have been made, or of any security he may hold over the debtor's estate, though there may be cases in which it is doubtful whether a cautioner, favoured, from peculiar circumstances, with a security without which he would not have consented to become bound, ought to communicate it.[2] Where cautioners are bound, not generally for the debt, but each for a separate portion of it, no one of them is obliged to communicate any security or relief which he may obtain.[3]

The general case in which cautioners are called upon, is when the principal has become insolvent, while it not unfrequently happens that one cautioner or more may be in the same position. The various arrangements to which such circumstances give rise will be considered under the subject of Bankruptcy.

SECT. 3.—*Discharge of Surety.*

When the debt for which a cautioner has become bound is paid, from whatever source, the cautioner is discharged. The creditor may discharge him either by discharging the principal debtor, or by resigning the additional security which he holds through the cautioner, in which latter case the principal party will continue bound, while the cautioner will be relieved.[4] By the principal party compounding the debt the cautioner is relieved, and it is a general rule that the same will be the result of "a composition-contract voluntarily entered into with him [the debtor] by the creditor without the consent of the cautioner."[5] A statutory composition-contract, in terms of the sequestration laws,* will not release the cautioner, whether it have or have not been acceded to by the creditor.[6]

---

[1] Low *v.* Farquharson, 8th Feb. 1831; but see Alston *v.* Denniston, 2d Dec. 1828.—[2] B. C. i. 349. M. St. cxv.—[3] M. St. cxv. Lawrie *v.* Stewart, 6th June 1823.—[4] E. iii. 3, 66.—[5] Br. St. 945.—* See Index, Composition-contract.—[6] Br. St. 945.

The cautioner may be discharged indirectly by the act of the creditor, as in the case of his giving the principal debtor time beyond what is stipulated, or what is reasonable. What is reasonable time is of course a matter of circumstances. A person having agreed by letter to see a debt paid, provided diligence were not done till a certain day, and a delay of three weeks from that day being granted to the debtor without the writer of the letter being consulted, he was found not liable.[1] Where one had guaranteed the price of whatever flour a person should purchase within three months, flour having been purchased immediately, and the purchaser's bill given at three months, after which period he was allowed to renew his bill, the cautioner was still found liable.[2] The cautioner may, however, neutralize the effect of giving time, by its being in conformity with his own wish or consent. A cautioner on a bill at four months, who on its dishonour wished it to be renewed, and said he understood "the money was to be allowed to lie for a considerable time," was found debarred from the plea of giving time, protest being recorded five months after the lapse of the term of payment, and diligence being proceeded in four months thereafter.[3] It has to be observed that there is a considerable difference between delaying to apply and giving time beyond what the security has stipulated for. The former is a neglect by the creditor of the mutual interest of himself and the cautioner, in consequence of which the surety would probably be released if it have been gross and unbusiness-like in its extent. In the latter case, however, the creditor substitutes a different contract for that which was guaranteed by the cautioner, and therefore it is said that the surety is released if time, however short, be given.[4] The rule as now settled by the House of Lords is, "That if a creditor without the consent of the surety give time to the principal debtor, by so doing he discharges the surety, that is, if time be given by virtue of positive contract between the creditor and principal—not where the creditor is merely inactive."[5] Extreme negligence of any kind on the part of the creditor in making good his right, such as his giving up funds over which he has a right of retention, relinquishing any security which he may have over the debtor's estate, &c., neglect to keep a proper watch over the proceedings of the debtor if the security be for his

---

[1] Farquharson *v.* Hutchison, 6th June 1826.—[2] Cook *v.* Moffat, 7th June 1827.—[3] Todd *v.* Davidson, 3d June 1828.—[4] Br. St. 933.—[5] Creichton *v.* Rankin, 26th May 1840. 1 R. 99.

good conduct, or if it cover a series of transactions, and the like, will release the cautioner.[1] It will not, however, in every case relieve a cautioner for a party intrusted with pecuniary transactions that arrears are allowed to accumulate against him.[2] A cautioner was relieved where there had been a delay in perfecting an heritable security which was to accompany the cautionary obligation.[3]

SECT. 4.—*Prescription.*

Certain cautionary obligations for payment of money prescribe or become extinct on the expiry of seven years from their date.[4] It is held that this prescription does not apply to a cautionary obligation contracted abroad though sued for in this country.[5] By the terms of the act, where the cautioner uses the form of binding himself as principal, the prescription will not take place in his favour unless the bond contains a clause of relief by the principal debtor, or the principal debtor gives a separate bond of relief to the cautioner, which is intimated to the creditor. It was held not an equivalent to intimation to the creditor, that the debtor's letter of relief was drawn by the creditor's agent who had drawn the bond.[6] In the special circumstances where this was decided it did not appear that in drawing the letter, the law adviser was acting as agent for the creditor. Where the cautioner designed himself "*cautioner*, *surety*, and full debtor," the two former words were held so to qualify the last that prescription ran in his favour without an obligation of relief.[7] The words of the act are "that no man binding and engaging.....for and with another conjunctly and severally in any bond or contract for sums of money," &c. The cautionary obligation, to come under the act, must therefore be incorporated with the principal one; and where a bond had been granted, a letter guaranteeing performance of it, not narrated or mentioned in the bond, was found not to prescribe.[8] Professor Bell says, "The statute, by its words, applies only to bonds for sums of money; and this has been held rather too strictly perhaps to apply only to loans of money to be repaid within the seven years."[9] It was main-

[1] B. C. i. 361.—[2] Falconer *v.* Lothian, 8th March 1843.—[3] Fleming *v.* Thomson, 23d May 1826, 2 W. & S. 277.—[4] 1695, c. 5.—[5] Alexander *v.* Badenach, 23d December 1843.—[6] Drysdale *v.* Johnstone, 25th January 1839.—[7] Scott *v.* Yuille, App. 15th September 1831, 5 W. & S. 436. Monteith *v.* Pattison, 3d December 1841.—[8] Tait *v.* Wilson, 8th December 1836.—[9] 1 B. C. 357.

tained in one case, that on this rule the principal and cautionary obligation both required to be for money advanced at the moment; but it was found that the transaction might be for the fulfilment of an old obligation, and that the cautionary obligation attached to a bond given as an equivalent for certain obligations in a marriage-contract which had not been fulfilled, prescribed in terms of the act.[1] "Cautioners *ad facta præstanda* have not the benefit of the act; nor judicial cautioners, as in suspensions and loosing arrestments; nor cautioners in marriage-contracts; nor for the discharge of an office. Neither has a cautioner in a bond of relief the benefit of this act. Cautioners for payment of a composition in bankruptcy are not comprehended under the act."[2] It is questioned whether the statute applies to a bond for a cash credit, with cautioners.[3] The act has been found not to include a cautioner in a confirmation. (*See above*, p. 114.)[4]

It will not give a cautionary obligation for discharge of an office the benefit of prescription, that the cautioner becomes bound in the same deed with the original debtor;—there must be a distinct sum of money for which the surety is responsible. In a late case, where prescription was pleaded by the representatives of such a cautioner, it was given as the opinion of the court, that if either the cautioner or his representatives wished to take the benefit of the act, "they ought to have intimated that they withdrew their security, —a settlement of accounts would then have taken place,— the sum for which the factor was liable would have been ascertained, and for that specific sum he and his cautioners should have given bond. In that way the original obligation would have been extinguished by novation, and that which was substituted in its room would have been valid for seven years only from its date."[5] Commercial guaranties do not prescribe.[6] This species of prescription is not like others interrupted by action and diligence (*see* Index, *Prescription*); but if diligence have been commenced before the expiry of the seven years, it may be followed out.[7]

---

[1] Monteith *v.* Pattison, 3d December 1841.—[2] B. C. i. 357—[3] Alexander *v.* Badenach, 23d December 1843.—[4] Gallie *v.* Ross, 4th March 1836.—[5] Kerr *v.* Bremner, 5th March 1839, affirmed as to this point, Bremner *v.* Campbell, 1 Bell, App. 280.—[6] B. C. i. 359.—[7] 1695, c. 5.

CHAPTER II.

VARIOUS KINDS OF CAUTIONARY OBLIGATIONS.

SECT. 1.—*Guaranties and Letters of Credit.*

THERE is perhaps no branch of the law involving distinctions so nice as the question whether a person has engaged to guarantee another or not; nor is there any where individuals are so liable to be ignorant of the effects of what they have done, and to find that the law deduces conclusions from their acts which they never had in view. Where the intention has only been to give one man a good impression of another's character; where nothing was meant but a mere introduction; where the sole intention was to supply useful information; in all these cases it has happened that a man has become security for the solvency of another. It has been stated as a general principle that cautionary engagements of all kinds should be in writing. It repeatedly happens, however, that the obligation is verbally incurred. "As with us," says Mr Brodie, "verbal bargains about moveables are valid, so where the transaction itself is verbal, a verbal guarantie interposed at the moment, and as forming a constituent of the contract, is effectual and proveable by witnesses. But it is only so where the verbal cautionary obligation is thus interposed. It is not for future contractions any more than for past; and where the original bargain is perfected by writing, so must the other."[1] Professor Bell says, "If goods be furnished, or money paid, or indulgence given from the immediate execution of diligence on the faith of the engagement, though verbal, and with the knowledge of the person so engaging, the obligation will be effectual by the law of Scotland."[2] Thus, Hunter going to market with cattle, met Carson and Gordon, the latter of whom bargaining about the cattle, the former voluntarily observed that there was not a better man in Scotland for the price, and that Hunter might take his bill at three months without hesitation, as it was as good as the Bank of Scotland. Hunter did take his bill at three months. The cattle were delivered, the purchaser being insolvent did not pay the bill,

[1] Br. St. 923.—[2] B. C. i. 371.

and Carson, though ignorant of his insolvency, was found liable.[1]

In a case which was well considered, it was found that a statement to the following effect could not be allowed to go to proof in an action for subjecting a verbal guarantor to payment of a debt, viz. that arrangements had been completed for arresting a person in the rank of a gentleman—that in the emergency he appealed to an acquaintance who agreed to present him to the holder of the diligence at a fixed time and place—that this acquaintance was desired to put the engagement in writing, but declined, on the plea that both he and the debtor were gentlemen, and his word was as good as his bond—and that the debtor did not appear at the time specified.[2] This was not a pure question of guarantie, as an obligation to present a person to subject himself to legal diligence, or to pay the debt if he fail, is accomplished by a Bond of presentation, for which there is an accepted style. (*See* p. 229.) It would appear that in England the only principle on which a person has been held to become verbally liable for the debt of another person is by misrepresentation involving fraud. No such principle, it will be observed, has ruled the Scottish decisions; and with us there seems scarcely to have been a line of distinction between the case where a party has intimated his intention to make good the default of another, and the case where he has not had any such intention, but where he has been made liable for the debt because he was fraudulently the means of the creditor giving credit.[3] In England, Lord Tenterden's act has rendered it necessary that even a representation of character and credit, to bind the person making it, must be in writing.[4]

It would be impossible to discuss the various forms in which written guaranties may be constituted. In England, by the statute of frauds, there must be a *consideration* on the face of the guarantie, *i. e.* it must bear that the creditor does something, or resigns some right;—that he gives credit or abstains from exaction, &c.[5] It would seem, moreover, that a guarantie must be expressly undertaken, and that the party cannot be rendered liable by inference, except under the plea of wilful misrepresentation. Thus, a letter in the following terms was not held to be a guarantie in England: —"As I understand that Messrs A. & Co. have given you

[1] Hunter *v.* Carson, 17th February 1824.—[2] Chaplin *v.* Allan, 5th February 1842.—[3] Br. St. 926.—[4] 9 Geo. IV. c. 14, § 16.—[5] See Theobald on Principal and Surety, 6, *et seq.*

an order, &c. which will amount to about £4000, I can assure you from what I know of A.'s honour and probity, you will be perfectly safe in crediting them to that amount. Indeed, I have no objection to guarantee you against any loss from giving them this credit."[1] In Scotland the result of the decisions has been, that a recommendation to give credit to a person, or even an instruction to another to recommend individuals to give him credit, will constitute guarantie. Thus, M. wrote to Messrs J. L. & Co.,—"In the event of any reference being made to you regarding the responsibility of my esteemed friend A. S., I shall feel much obliged by your stating that he is in excellent credit, and possessed of capital for carrying on an extensive business." The writer was held liable to persons who, on being referred to J. L. & Co., saw this letter, and trusted A. S.[2] Where A. said in a letter to a bank-agent, "should B. present his acceptance to you at four months after date for £30 sterling, I shall indorse the same on presentation," he was held liable, though the acceptance was not presented for indorsation, and he received no notice of it till it was dishonoured.[3] A letter contained reasons for having a good opinion of a man, and concluded, "I can therefore recommend him to your notice, and you may rely upon his being trustworthy to the amount of any obligations he may come under." It was given in answer to a request for an opinion, not for a guarantie, and the party who obtained it, had been informed in a previous stage of the inquiries, that the party who wrote it would not in any circumstances give a guarantie. It was held not to infer a guarantie.[4]

The following general rules are laid down by Professor Bell: 1. "That when the person who writes in commendation of the character and credit of another, does so in consequence of an application on the part of him who is about to engage with that other in transactions, his expressions are to be interpreted largely in his own favour; and so that the friendly information thus drawn from him may not entrap him into a guarantie. 2. That he will be liable for the consequence of wittingly deceiving another into a transaction with a person unworthy of credit. This, however, is a case difficult to be made out. The examples of it which are to be found in the books are in cases where the recommenda-

[1] M'Iver *v.* Richardson, 1813, 1 M. & S. 557. See Br. St. 926.—[2] Kembles, &c. *v.* Mitchell, 31st May 1831.—[3] Watt *v.* National Bank, 28th May 1839.—[4] Johnston *v.* Owen, 15th July 1845.

tion was spontaneous. 3. That a recommendation spontaneously given, if expressed in general terms, speaking merely of the respectability, regular conduct, and good credit of the person introduced, is an introduction only, not a letter of credit; but where there is a distinct allusion to a particular transaction, and an assurance of safety in entering into it, this, where spontaneous, is held to amount to a guarantee, even where it is only a colloquial or verbal expression of assurance."[1]

In questions between country people, whose intentions are not always clearly expressed by the words they use, letters are not so literally construed as when they are written by men of business; and evidence as to the character of the transaction and the intention of parties, will convert into a guarantie, terms that in other circumstances would not receive that interpretation.[2]

Such recommendations or guaranties are strictly limited to the transactions which the granter may have had in view, and if he has referred to transactions with any particular person in the character of creditor, no other person can found upon the recommendation.[3] A person was introduced to a dealer with the words, "I hope she will be a good customer; and I am sure will pay you at the time she may fix with you; so you are quite safe with her, as Mr Goodsir can also inform you." The person to whom this was addressed not having the article wanted, sent the bearer to another dealer, representing the letter to him as a guarantie. The court held that it would have been a guarantie to the person to whom it was addressed, but was not so in favour of the other dealer.[4] Where a person had guaranteed a draft by A. on B., it was not held that he guaranteed a draft by a third party on B., though payable to A.[5] Where the letter of Guarantie was addressed to "Watson and Company," and that firm had been dissolved a few days before, and the two persons who composed that firm taking a third into partnership, constituted the firm of Watson, MacNight, and Company, the guarantie did not cover goods furnished by that company.[6] Where it was the original intention that there should be two sureties, and one only signed a guarantie, beginning "*We*, the undersigned," &c., which was changed

---

[1] B. C. i. 371, 372.—[2] Hardie *v.* Macdonald, 24th Feb. 1844.—[3] B. C. i. 573-575.—[4] Philip *v.* Melville, 21st February 1809.—[5] Ross *v.* Greig, 11th February 1834.—[6] Bowie *v.* Watson, MacNight, and Company, 11th June 1840.

to "I," he was found not to be liable.[1] Any limitation or presumed limitation in time will be interpreted with the same strictness, but if there is no limitation, the guarantie lasts until it is recalled.[2] Where one had become bound to any persons who would furnish goods to another, "to see them paid in six months after delivery," this was held not to imply that the fulfilment should be demanded within the six months, but that it was exigible after the lapse of that period.[3] Where the terms were, "I engage to see you paid for stuffs furnished to J. B. to the extent of £200 at the usual credit of four months," this was held a current guarantie, and the plea that the use of the past participle "furnished" applied only to transactions anterior to its date was not admitted.[4] Where a person limits his guarantie to a certain sum, he becomes liable to that extent, though the credit given to the principal should have exceeded it.[5] Any condition under which the guarantie is given must be strictly fulfilled. Where parties abroad obtained a guarantie for a consignee for "the payment of any bills drawn [on him] from and after the date hereof . . . . Bills of lading and invoice having been regularly forwarded," and the consigners shipped goods to a third party who transferred part of them to the person whose credit was guaranteed, the guarantie was held not to cover that transaction.[6] It would seem that where there is a regular guarantie, it covers the price, not only of effects sent to the party in whose favour it is conceived, but such as are sent to others on his order.[7]

SECT. 2.—*Del Credere.*

A *del credere* commission is not, properly speaking, an act of cautionary,—it is merely held to involve a guarantie. It is an authority to an agent or factor to dispose of goods, an additional commission being paid by the vendor, on condition of the factor becoming responsible for the price. Professor Bell says that it is "an engagement to be answerable as if the person so binding himself were the proper debtor. . . . Where a factor, employed to sell goods, receives a *del credere* commission, he is liable to the principal for the price to be recovered, whether he ever receive it or not. He

---

[1] Loudon *v.* Jackson, 19th February 1825.—[2] B. C. i. 377.—[3] Fraser *v.* M'Turk, 25th June 1822.—[4] Barr *v.* Downies, 13th November 1840.—[5] Cochrane & Co. *v.* Mathie, 22d June 1821.—[6] Grieve *v.* Dow, 16th May 1839.—[7] Raimes *v.* Galloway, 14th March 1842.

is placed, in relation to the principal, precisely in the same situation as if he had actually received in loan the money of the principal; and no payment that would not be effectual as between debtor and creditor will discharge his responsibility. This sort of guarantie is not, on the one hand, a cautionary obligation, in the common sense of that expression, for the factor with a *del credere* commission is liable directly, and without any benefit of discussion; neither is it, on the other, to all intents and purposes, a *delegatio debiti*; for, if the guarantee* fail, the principal is entitled to resume his character, and recover from the proper debtor, if he have not previously paid to the guarantee.*"[1] Though this doctrine should be acted on in Scotland, however, it is clear that the law of England makes the holder of the *del credere* commission simply a guarantor, who has the benefit of discussion.[2] "A factor or broker," says an English writer, "acting under a commission *del credere*, is a *surety* to his principal for the solvency of those with whom the principal deals through his agency. He is in no case, as regards his own employer, himself the principal in any contract which he may make for him, and is liable only in default of those with whom he deals. It follows, therefore, that, before he can be charged, it must be averred in the declaration, and proved at the trial, that the principal debtor has made default."[3]

SECT. 3.—*Cautioners to Cash-credits.*

A bond of cash-credit with a bank is an obligation by which, in consideration of the bank permitting the principal to operate on a cash-account to a limited amount, certain parties become bound for the payment of the balance which the bank may, at any time during the currency of the security, show against the principal, within the sum limited. In other words, the cautioners become bound to pay the drafts and discounts of the principal with legal interest on them, deducting deposits and payments, with bank-interest on them. The obligation is generally conjunctly and severally, as against all parties, principal and cautioners; by which means the bond is not struck at by the septennial limitation, and the bank is not compelled to discuss the principal in the first place. (*See above*, pp. 213, 217.)[4] It has been

* That is to say the guarantor.—[1] B. C. i. 378.—[2] Ellenborough, C. J., in Morris *v.* Cleasby, 4 M. and S. 566. See Br. St. 922, n.—[3] Paley on P. and A. 111, Lloyd's n.—[4] B. C. i. 368.

found, however, that the arrangement does not deprive the sureties of the other equities in favour of a cautioner, in the constitution of the obligation; and so, where certain parties were described as the obligants in the bond, and one of them had not signed it, the others were held not to be liable.[1]

Where one granted a guarantie for a person who had a cash-credit, saying, "Mr G. D. has mentioned to me that he may have occasion to overdraw his account to the extent of £3000; and, if he should do so, I hereby become bound to repay the same to you, in the event of his failing to do it;"—this was held not to be merely a guarantie for one advance, but to be an addition to the cash-credit, covering like it the balance on a series of transactions.[2] Where, of three co-obligants in a cash-credit, two granted a letter requesting that it might be continued "in terms and to the extent of the bond," on the holder's decease, in favour of his son,—they were held conjunctly liable, though in terms of the bond there was a third obligant to share the responsibility with them, and they alleged that they granted the letter only as a continuance of their liability under the bond.[3] Under a cash-credit in the regular form, the bank may introduce discounts of bills and other charges against the principal party, which have not properly formed part of his cash-account. The transactions charged on however must be strictly legal and regular. It was found on appeal, that the bank could not pursue cautioners on drafts drawn beyond the statutory distance (which was then ten, but is now fifteen miles), or wrong dated, where the bank-agent was aware of these circumstances; and this though the drafts were entered in accounts doqueted by the principal.[4] In a continuation of the same case, it was found that the bank was not entitled to impute indefinite payments in the first place to the extinction of the drafts destitute of the statutory requisites.[5] A cautioner in a cash-credit for all bills on which C. F.'s name might appear, was liable for bills discounted to C. F. & Co., a concern in which C. F. had no partner.[6]

The rapidity of the transactions, and the frequency of the change of the relative positions of the lender and borrower towards each other, appear to give the cautioner in a cash-credit less benefit than other cautioners, from concealment of

[1] Paterson v. Bonar, 9th March 1844.—[2] Sir W. Forbes, &c. v. Dundas, 4th June 1830.—[3] Blair v. Taylor, 1st July 1836.—[4] Swan v. Bank of Scotland, 6th July 1835, 2 S. & M'L. 67.—[5] Swan v. Bank of Scotland, 21st November 1839.—[6] Booth v. Commercial Bank, 16th May 1823.

circumstances which affect his risk, or from latitude being given to the debtor. In one case, the whole amount of the cash-credit had been at once drawn out. After more than a year had elapsed, some applications for payment having been made, in the mean time the bank joined another, and a new firm was made. The new firm gave the debtor a new cash-credit, with his old cautioners and a new one added. He exhausted this credit in one draft, and applied the sum in paying up the previous one. Though the new cautioner was not informed of the circumstances, the transaction was sustained.[1]

The bank, on being paid by the cautioners, must assign to them whatever securities or negotiable documents they hold from the principal.[2] The cautioners may terminate their responsibility by notice to the bank; and, unless such notice be given, a cautioner and his representatives will remain indefinitely liable.[3] It is generally a stipulation in such obligations that an account made up from the books of the bank, and certified by an officer of the bank, shall be registrable for execution, so as to enable the bank to obtain summary diligence against the cautioners, as if they had bound themselves to pay a specific sum.[4] (*See* Index, *Diligence.*) A cash-credit may be founded on heritable security.*

SECT. 4.—*Surety for faithful Performance.*

Cautionary obligations for faithful performance generally embrace periods of time and successive courses of transactions. If the original engagement with the principal be terminable at the will of the parties, the cautioner will be at liberty so to terminate his obligation at pleasure, if a particular continuance be not specified. If, however, the original engagement be not terminable, and there is but one definite obligation extending over the period (as in the case of apprenticeship), the cautioner cannot release himself.[5] This species of obligation may be united to a cautionary of solvency, as in the case of a commercial agent. The party creditor in the obligation is frequently better acquainted with the risk to be run in giving caution than the cautioner himself, and any concealment on his part will have the effect of fraud, and render void the obligation. Thus the Bank of Scotland finding it necessary, from the suspicious and irregular con-

[1] Hamilton v. Watson, 8th December 1842.—[2] B. C. i. 369.—[3] Ibid.—[4] Ibid. 364. Br. St. 938.—* See below, Part XII. Chap. II.—[5] Br. St. 928.

duct of one of their agents, that he should be dismissed, or should procure additional cautioners, the additional cautioners, not being informed of the state of matters, were found not liable for the frauds and deficiencies of the agent, although the bank at the signing of the obligation was not aware of them, but only saw irregularities.[1] After conflicting decisions, it has been settled, that to release a cautioner who has been misinformed of the extent of his risk, it is not necessary that he should show the misstatement to have been wilful and fraudulent, but sufficient if it be shown that it was such as must be presumed to have influenced him in undertaking the cautionary.[2] If any peculiar check or watchfulness on the part of the employer is stipulated for between him and the cautioner, it must be strictly attended to, to preserve the cautioner's liability.[3] Though no stipulation be made on this point, the employer must not allow the cautioner's interest to be endangered from undue negligence in observing that the debtor performs his duty.[4] He must not alter the rotation of duties stipulated to be performed when the obligation was entered on, nor, if no stipulation was made, can he materially alter them from what they were at the time of taking the obligation, or from what are the usual duties connected with the nature of the office,—without relieving the cautioner.[5]

Representatives.—If such obligations in the usual terms bind the cautioner and his "heirs, executors, and successors," his representatives are in the same situation in which he was. If the obligation was terminable by him, it will be so by them; if it was not terminable by him, it will, so far as they are concerned, be in the same position as any debt against the estate. When representatives find that their ancestor was a cautioner for faithful performance of an office, if they do not wish to continue liable, they should give warning to that effect. Unless a balance be struck at the time of the cautioner's death, and new arrangements made, the representatives will be liable if there be ultimately a balance against the debtor, however the account may have stood at the cautioner's death.[6]

Messengers at Arms, before they can practise, must give

---

[1] Smith, &c. *v.* Bank of Scotland, 14th January 1829.—[2] Railton *v.* Mathews, 27th January 1844, reversed, 3 Bell 56. Royal Bank *v.* Ranken, 20th July 1844.—[3] Dalzell *v.* Menzies, 15th February 1831.—[4] Leith Bank *v.* Bell, 12th May 1830. Thistle Society *v.* Garden, 17th June 1834. Br. St. 332.—[5] Mein *v.* Hardie, 19th January 1830.—[6] Bremner *v.* Kerr, 14th July 1837, App. 2 S. & M'L. 895, and Court of Session, 5th March 1839.

caution to the Lord Lyon "for the damage, interest, and expense, which the lieges shall sustain through the negligence, fraud, or informal execution of the messenger." The cautioners are liable not only to the employers of the messenger, but to all against whom he may have committed any fault. They are only liable for what he may do in the capacity of messenger. That the performance of the messenger's duty would have been fruitless, as from the desperate circumstances of a debtor whom he is employed to apprehend, will not release him from responsibility for the amount of the debt.[1] The cautioner of a messenger will not, in every case, be liable for a series of lawsuits, which may be made the consequence of the messenger's blunder.[2] In a late case, however, where the employer had served a protest on the messenger intimating that he held him and his cautioner liable for whatever damage an irregularity might occasion, he was entitled to recover from the cautioner though he had not intimated the legal proceedings held against himself.[3]

Notaries-public, on the same principle with messengers, find caution on being admitted to exercise their profession.[4]

SECT. 5.—*Judicial Caution or Bail.*

Judicial caution, generally termed Bail, may be to three effects: 1*st*, To prevent a person who may be responsible, in consequence of a lawsuit, from leaving the country; 2*d*, To make such a person appear in court when summoned; or, 3*d*, To make good the sums which may be decreed for against him.

Bail in Criminal Cases, which, in as far as regards the person bailed, belongs to the department of criminal law, is of the second class. As to the person becoming surety, its extent is, that the individual accused shall appear to "answer for any libel which shall be offered against him, for the crime and offence wherewith he is charged," and it is generally taken for a period of six months. If the words "and at all diets of court for such action" are not added, when the accused appears the cautioner is discharged should the case be delayed.[5]

Caution that a litigant in a civil case shall remain within the country, is called *judicio sisti*—to abide judgment. It is found by persons who are shown to be *in meditatione fugæ*,

---

[1] B. C. i. 365.—[2] Fraser *v.* Andrew, 28th January 1831.—[3] Struthers *v.* Dykes, 14th February 1845.—[4] B. C. i. 366.—[5] Hume on Crimes, ii. 94.

or preparing to leave the country. But the law has been stretched in this case to the second description of judicial cautionary, by which the surety becomes bound to produce the debtor in court. This obligation is discharged by the death of the debtor, or his production in court. In case of failure of performance, the cautioner becomes liable to implement the decree against the debtor, with costs, interest, &c.[1]

A bond of caution is given by the person who brings a suspension of a charge on the decree of a court, or on an obligation registered for execution, and generally in advocations from inferior courts. (*See* Index, *Diligence.*) The extent of the obligation in the former instance is generally, that the cautioner becomes bound for the suspender paying whatever the decree of the court, after considering his grounds of suspension, may award against him; but there are exceptions to the extent of the obligation, according to the merits of the case. The caution in advocations is for the expenses in the cause in the inferior court, and in the Court of Session.[2]

The only cases in which a defender, pursued for a debt, is bound to find caution for payment of the debt, are those strictly maritime, in which foreigners or aliens are generally parties, and which were in use to be brought before the Court of Admiralty. This caution is technically termed *judicatum solvi*,—to pay what may be adjudged.[3] It has lately been abolished in maritime actions in the Sheriff Court, unless where the judge finds special reason for awarding it.[4]

A bond of presentation is an obligation by which, when a creditor has apprehended his debtor, or is possessed of the legal means of apprehending him, a cautioner may, to enable the debtor to attend to his affairs, become bound to present him to the creditor at a period specified, or in default to pay the debt. Here the cautioner becomes the keeper or jailor of the debtor, and can compel his appearance, although he should have sought the protection of sanctuary. The death of the debtor terminates the liability, and his illness or other cogent cause may suspend it.[5] In a case cited above (p. 220) a verbal engagement was found not to be equivalent to such a bond.

---

[1] B. C. i. 382-385. D. P. 312.—[2] 6 Geo. IV. c. 120, § 41. E. iii. 3, 71. Beveridge on the Bill-Chamber, 30, *et seq.*—[3] D. P. 261, 313.—[4] 1 & 2 Vict. c. 119, § 22.—[5] B. C. i. 385.

Somewhat similar is caution on loosing arrestment, which is to the extent of "payment to the arrester of the sums arrested, if they shall be adjudged to belong to him."[1] (*See* Index, *Arrestment.*

[1] E. iii. 6, 12.

PART IX.

CONTRACTS OF TRUST AND SERVICE.

CHAPTER I.

Trusts.

The law of Trusts has a relation to various other branches of our system, with which it has occasionally to be discussed. It has been partly considered in connexion with marriage-contracts (see p. 20), and again with reference to family settlements (p. 113), while in name at least it has a still more conspicuous position in the arrangements for the distribution of bankrupt estates among creditors, being there considered in two different forms,—the one where there is a statutory trustee acting under the bankrupt act,—the other where the method of a private trust is adopted for the distribution of a bankrupt estate. It has been considered, that notwithstanding these occasions for noticing the special application of this branch of the law, the scope of the work would be incomplete, without a slight sketch of the principles of law applicable to Trusts in general.

Sect. 1.—*Appointment and Nature.*

Erskine defines a trust to be "of the nature of a depositation, by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it may be applied to certain uses for behoof of a third party."[1] The transference of property, either existing or prospective, seems thus to be essential to the character of a trust, and where there are services of the same class with

---

[1] E. iii. 1, 32.

the functions of a trustee performed without any transfer of property, the connexion between the parties appears to come within the character of agency and not of trust. In early times, when the political conduct of proprietors, or other strongly influencing motives, prompted them to conceal the real ownership of property, and the irregular state of the law aided the dubiety, latent trusts were frequently created, the person who had a conveyance as absolute proprietor being trustee for another. This was partly remedied by a statute enacting that no action of Declarator of trust should be competent, unless on the oath of the trustee, or his signed acknowledgment in a declaration or back-bond of trust.[1] "Since which time," says Erskine, "trust-deeds have been seldom granted, without either a clause in the deed expressing the uses, or a back-bond by the trustee declaring them."[2] An acknowledgment by the trustee's representative has been held to fulfil the requisites of the act.[3] The act is intended to apply to actions to establish the trust, at the instance of the party who alleges himself to be the truster or of his representatives, against the party whom he alleges to be his trustee. In questions where creditors or other third parties are concerned, the constitution of the trust may be proved by ordinary evidence.[4] In a late case where an absolute disposition had been granted for the purpose of a temporary transfer for creating votes out of the superiority, and no possession had been taken by the disponee, and the disponer *bonâ fide* continuing in possession burdened the land,—the disponer becoming bankrupt, the trustee on his estate obtained a conveyance from the disponee's heir, and thus in his alternate qualities, as representative of the disponer for whom the lands were held in trust, or as representative of the disponee to whom they were absolutely conveyed, attempted a reduction of the securities, but unsuccessfully—the court finding that the disposition "is proved and admitted to have been a trust title, granted for a temporary purpose, and for the granter's own behoof, which passed no right of property in the lands to the said [disponee] who never had any possession.[5] It thus appears that there may be cases where there is an absolute conveyance which, never having been followed by possession, or made the ground of a claim on the part of the person benefited, is to be treated as a merely temporary and

[1] 1696, c. 25, Duggan *v.* Wight, M. 12761.—[2] E. iii. 1, 32.—[3] Fordyce *v.* Montgomery, 7th February 1811.—[4] Elibank *v.* Hamilton, 16th November 1827.—[5] Lindsay *v.* Giles, 27th February 1844.

nominal trust, not having even so much of the character of a genuine trust that the trustee is temporarily invested with the property.[1]

Investment.—In a genuine trust the divestiture of the truster and the investment of the trustee constitute the primary element. It must generally be a main object with the parties, that the property concerned, whether heritable or moveable, should not be attachable by the truster's creditors, or in any other way subject to be affected by his conduct or operations. To accomplish this, possession must be changed, and besides the title given to the trustee by the deed of trust, there should be delivery of moveables, infeftment of land, and notice of assignments.[2] Where there are more trustees than one, it is not necessary that the investment should be in them all. The management may be distributed among the whole—the investment may be in the person of one or more. Sometimes the limitation of the trustee's right is incorporated in his title, while in other cases his title is absolute, and the limitation is contained in a back-bond. The latter method has facilities for effecting sales and transactions with third parties, but it may subject the estate to risk from the trustee's creditors.[3]

The purposes of the trust may be set forth in the deed investing the trustees, or power may be reserved to set them forth wholly or partly in a separate writing or succession of writings. In the latter case the law of deathbed may operate, rendering ineffectual any destination contrary to the interests of the heir-at-law, unless he have been previously disinherited (*see above*, p. 97). The trustees are debtors to any person holding a beneficiary interest under the trust, and as a creditor, such a person has, after the vesting, a preference over the creditors both of the truster and the trustees. This beneficiary right may be bequeathed or assigned, or may be attached by creditors.[4]

Trusts, as they come under our notice on the present occasion, are for the accomplishment of private objects relating to succession, the payment of debts, &c. Those creations of permanent establishments for the accomplishment of public purposes, which are called Mortifications, and are generally in the hands of corporate bodies, have a more direct connection with public law. Questions as to whether the objects

[1] See the Law of Bankruptcy, &c. p. 338.—[2] See Forsyth on Trusts, 70, *et seq*—[3] B. P. 1994.—[4] Gibson *v.* Arbuthnot, M. 12885. Gordon's Trustees *v.* Harper, 4th December 1821. Macdowall *v.* Russell, 6th February 1824.

of a trust are competent, are generally connected with this department; and though the rule that no contract, obligation, or deed, for the furtherance of any immoral or illegal object, can be supported by the courts of law, must apply to trusts, there has hardly ever been occasion to question private trust-deeds on such grounds.

Thelusson's Act.—The only special restriction on the purposes of a trust is by Thelusson's Act, passed in 1800, which prohibits any one, by any description of deed, from providing for the accumulation of property, or its returns, "so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living, or *in vêntre sa mère* at the time of the death of such granter, devisor, or testator, or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender will or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated." Trusts contrary to the provision are null. The act specially exempts "any disposition respecting heritable property" in Scotland,[1] and it was found both by the Court of Session and the House of Lords, that the Strathmore settlement came within the exemption.[2] The accumulation in this case was not a perpetuity, and the Lord Chancellor said: "I do not mean to say that there may not be an extremely good ground for setting aside an accumulation, that is to go on for ever, and I do not consider how long or how short a period money or land may accumulate in Scotland." It was found that a trust for accumulating money in the public funds for a hundred years, to be then applied to the erection of an hospital for the benefit of "poor boys belonging to the inhabitants of Dundee," and to be under the management of the kirk-session, was struck at by the act.[3]

SECT. 2.—*Constitution.*

Where more than one trustee is appointed, it is expedient

[1] 39 & 40 Geo. III. c. 98.—[2] Strathmore *v.* Strathmore's Trustees, 23d March 1831, 5 W. S. 170.—[3] Currance *v.* Kirk-session of Dundee, 12th February 1846.

that the powers and duties of the trust should be conferred on the acceptors or survivors. Many litigations regarding the fulfilment of their duties, by trustees generally named without provisions for their not all accepting, not all surviving, and not being unanimous, show the utility of making the machinery of the trust flexible by such provisions.[1] It is usual to appoint a certain number a quorum, and it appears that in such a case, if by deaths or resignations that number do not concur, the trust cannot be fulfilled; while at the same time it appears that if a quorum of accepting trustees be in existence, no one of them will be entitled to withhold his consent from an ordinary act of management.[2] If there be no established quorum, and no special regulation on the subject, it appears that a majority of the existing trustees may act in the trust.[3] When a trustee has accepted, and the business of the trust has commenced, he is not entitled to resign, and one who had in such circumstances intimated a resignation was found not entitled to relief by his co-trustees from the expense of legal proceedings in which they had used his name along with their own.[4] But in a case where the business had not actually commenced, a trustee who had in a brief and general manner intimated his acceptance, and who differed with his colleagues on a material department of the conducting of the trust, was found entitled to retire.[5] It has been said that "when a trustee has urgent occasion to resign from the state of his own affairs, or it may be from the state of his health or avocations abroad, and in fact when this is not done capriciously, to embarrass the trust-management, he has a right to do so at the sight and by the authority of the Supreme Court."[6] In general, where the trust is continuous, not only are full powers conferred on survivors, but they are empowered to add to their number so as to keep up the succession of the trust. Where, by deaths or non-acceptances, there is not a sufficient number to put in force the trust, the court will give a remedy. It has been usual in such a case to appoint a factor or curator;[7] but in two late cases, where all the parties assented both to the appointment and to the persons, the court appointed a

[1] See Freen *v.* Beveridge, 28th June 1832, and Cases there cited.—[2] Lynedoch *v.* Ochterlony, 15th February 1827.—[3] B. P. 1993.—[4] Logan *v.* Meiklejohn, 26th May 1843.—[5] Bannerman *v.* Bannerman, 1st December 1842.—[6] p. Lord Ordinary Cuninghame in Watson *v.* Crawcour, 17th February 1844.—[7] Grant, &c. Petitioners, M. 7454, Campbell *v.* Campbell, M. 16203. Busby, 1st February 1823. Alexander and Others, 27th February 1824. Sheriffs *v.* Boyd, 24th January 1829. Douglas, 14th December 1839.

set of trustees, with the full powers of those who had been named in the original trust.[1]

SECT. 3.—*The Trustees—their Powers, Duties, and Responsibility.*

There are probably few matters on which individuals are more apt to seek a guide in the principles of the law than in desiring to ascertain their powers and duties as trustees, and at the same time there is scarcely any occasion for which the law is less prepared with general rules. The exigencies of trusts refer more or less to almost all the transactions in which individuals may be engaged on their own business, and each decision generally applies to its own peculiar circumstances, affording very inadequate means of framing a general rule. The most prominent of the generally received rules regarding the powers of trustees is, that whether it be so expressed or not, all the legitimate and legal operations suitable to the accomplishment of the ends of the trust are possessed by them; so, where trustees were infeft in land for payment of the truster's debts and with power of sale, they were entitled to enter vassals, and pursue declarators of non-entry.[2] In one case, which however was entirely special, where funds had been vested in trustees for the purchase of an estate to be entailed, having purchased one without a mansion-house, they were found entitled to apply surplus funds to the erection of a house.[3] It was found that the trustees of a trust for charitable purposes might sell superiorities (which were then valuable as creating votes) for the benefit of the trust, though not specially authorized in the trust-deed.[4] In one case where, from the context of the trust-deed, it was inferred that the truster intended to authorize the trustees to sell certain lands and entail them along with other lands, and a special power to effect this appeared to have been omitted in the trust—the Court of Session, in a litigation with a party whose interest it was that the lands should *not* be entailed, found the trustees entitled to sell and entail; but the decision was reversed.[5] It was found that the destination of and right to a meeting-house and other property of a dissenting congregation may be inferred from the

[1] Melville *v.* Preston, 8th February 1838. M'Aslan, 17th July 1841.—[2] Ker *v.* Russell, 7th December 1838.—[3] Sprot's Trustees *v.* Sprot, 11th March 1830.—[4] Moore's Trustees *v.* Wilson, 25th June 1814.—[5] Robertson *v.* Allan, 7th March 1832; reversed. 2 S. & M'L., 333.

circumstances in which they were built, and the conditions under which they have been apparently held.[1] Professor Bell says, on the authority of some cases in the last century, "In trusts for family purposes, or economical arrangements, the trustees are, like the truster himself, entitled to pay off debts, &c. as they are demanded. When judicially called upon to pay a debt, they are not safe preferably to answer a similar demand without having funds to pay both. When called on by creditors, though extra-judicially, if there be a manifest shortcoming, they are not safe to pay without a multiplepoinding."[2]

Responsibility.—The office of trustees is gratuitous, and hence, though there are not many decisions bearing on the point, it is held that they are entitled to employ factors and other persons necessary for the fulfilment of the labours of the trust, remunerating them from the trust-funds. The general expenses incurred *bonâ fide* in the furtherance of the trust, even in circumstances where perhaps it might be shown that the management might have been more economical, are payable out of the trust-funds. In the ordinary case, the trustees are by the deed declared not to be liable for omissions, or singly for their collective acts, but each for his own intromissions. This exemptive clause will protect them from responsibility for the persons employed even when a diligent supervision might have prevented damage to the estate.[3] But it appears that even when there is no such clause the trustees will not be responsible for the defalcations of apparently respectable and responsible officers appointed by them, or the failure of apparently respectable banks of deposit of the trust-funds.[4] It is a general rule that trustees must account for the funds put into their hands, either refunding them, or explaining how they have been exhausted; and thus, either themselves, or by the employment of proper persons, they must make arrangements for accounts of charge and discharge being kept where the nature and extent of the fund render such an arrangement necessary.[5] Where a party has a specific beneficial right under the trust, and the trustees are unable to account to him for the funds at their disposal, they are personally liable to him.[6] Although not, as above stated, personally responsible for the defalcations of persons in their

[1] Davidson *v.* Aikman, M. 14584.—[2] B. P. 1998.—[3] Traquair's Trustees *v.* Cheape, 16th February 1835. Home *v.* Pringle, 30th November 1837.—[4] Thomson *v.* Campbell, 16th February 1838.—[5] Gourlay *v.* Dumbreck, M. 16192.—[6] Hamilton's Creditors *v.* Hamilton's Trustees, M. 16201. Anderson *v.* Small, 12th February 1833. Cruickshank *v.* Cruickshank, App. 24th April 1845. 4 Bell, 179.

employment, though by vigilance the loss might have been avoided, yet they are responsible for gross negligence, especially for allowing the funds to be irregularly uplifted and employed. So where one of a set of trustees was directed by others to uplift funds, without receiving any regular appointment, and all the trustees signed the acknowledgments of receipt of the money, and, there being no meeting for eight years, while the trustee appointed to uplift the funds became bankrupt, they were found to be all personally liable.[1] If the trustees perform acts distinctly out of the limits of the trust, they will be personally responsible for the pecuniary loss so occasioned.[2] It may be presumed that salaried trustees would be subjected to the same responsibility as hired agents or factors; but the distribution of a small sum, not on a scale sufficient to remunerate the labours of the trust, was found not to create such responsibility.[3] The same case is one of several which show that it is not incompetent for the trustees to appoint one of their number the hired factor or agent of the trust.

Litigation.—Considerable latitude is allowed to trustees in litigating at the expense of the trust-fund. They are indeed bound to support the trust and the application of the fund to its purposes, and they are too often placed in a position in which they must either appear in the courts of law, or abandon these objects. The dubious character of the trust-deed, and the necessity of having their own powers and duties more clearly defined, frequently lead trustees into courts of law. In either of these classes of cases, though the decision be against them, if it do not appear that their proceedings are rash, vexatious, or unreasonable, the expenses decreed against them will fall on the trust-fund, and they will not be personally liable for them.[4] It has sometimes been acted upon indeed as a general principle, that when the litigation tends to develop the end and scope of the trust, the expenses of all parties to the action are allowed out of the trust-estate.[5] In a late case where an opponent's expenses were not allowed from the trust-fund, Lord Cockburn observed, "It is a very common conception, that all parties attacking a trust-fund are to get their expenses out of it. I hold that they must do so at their own risk."[6]

---

[1] Seton *v.* Dawson, 18th December 1841.—[2] Pollexfen *v.* Stewart, 9th December 1841.—[3] Home *v.* Pringle, 30th November 1837.—[4] Dickson *v.* Bonar's Trustees, 20th November 1829. Kirkland *v.* Crichton, 3d February 1842; but see Raeburn *v.* Dawson, 14th June 1831.—[5] Robertson *v.* Allan, 7th March 1832.—[6] Allan *v.* Fleming, 20th June 1845.

Personally profiting.—When any one of their own body is benefited by the management to the detriment of the trust-estate, or those interested in it, there will be a rigid exaction of responsibility, not only against the trustee who obtains the benefit, but against the others who have countenanced the transaction; so it was found where a preference was given to a creditor to whom one of the trustees was executor, and the fund became insufficient to pay another creditor.[1] The trustees must avoid any attempt personally to profit by the operation of the trust. They must give the trust the benefit of any discounts or deductions that may be made in the payment of trust-debts, or any other relief that may be given in transactions connected with the estate; "they are bound," as it is usually said, "to communicate cases;" and they must not acquire rights which may come into competition with claims to be made in favour of the estate.[2] To prevent all questions as to the fairness of their conduct, it is a general rule that trustees cannot purchase any part of the trust-estate.[3] By the last bankrupt act, the trustee in a sequestration is statutorily disqualified from purchasing.[4]

The Court of Session has authority over trusts and trustees, not only judicially when any ground of action arises, but ministerially in the shape of control and direction. In the decisions, a distinction has to be taken between those powers which the court find that the trustees possess, and the special powers which the court may, in its discretion, bestow on them. Thus, where a party conveyed estates to trustees, with power to sell a portion to pay debts, and to entail another portion, the former being insufficient for payment of the debts, the court found that it had power to authorize them to sell "either the whole or a part" of the remainder.[5] Trustees are removeable by the court, on a case being made out against them, either with regard to their general conduct and character, or with reference to the special circumstances. Bankruptcy, especially in the case of a single trustee, has generally been considered a good ground of removal.[6] The manner in which provision is made for conducting the objects of a trust when there are no trustees has been considered above.

---

[1] Young *v.* Johnston's Trustees, 15th June 1841.—[2] Forsyth, 113. Rae *v.* Glass, M. 16170. Wright *v.* Wright, M. 16193. Maxwell *v.* Maxwell, M. 16166. Sinclair *v.* Maxwell, M. 16186. Ogilvie *v.* Lyon, M. 16200. Crawford *v.* Hepburn, M. 16208.—[3] B. C. ii. 376. Hamilton *v.* Wright, App. 2d August 1842. 1 Bell, 574.—[4] 2 & 3 Vict. c. 41, § 99.—[5] Erskine's Trustees *v.* Wemyss, 13th May 1829.—[6] M'Dowal *v.* M'Dowal, M. 16210. Towart, 14th May 1823. Smith, 15th May 1832.

CHAPTER II.

ARBITRATION.

SECT. 1.—*Submission.*

ARBITRATION is a contract by which, in reference to some specific matter which is or may be in dispute between parties, they become bound to submit to the judgment of an Arbiter or Arbiters. A person may be bound in reference to Arbitration in two manners:—1*st*, The dispute may not yet have arisen; but, in contemplation of its arising, he may have become bound to refer it to arbitration. 2*d*, A valid Submission may have been entered into, setting forth the matter in dispute, and binding the parties to abide by the award. The decisions make little distinction between an actual Submission and an obligation to submit. The latter is a usual clause in contracts of Copartnership, and is not unfrequent in contracts for the performance of work, leases, &c. It will be readily understood that in an actual Submission the person who is made Arbiter must be clearly indicated by name and description; but it is very important to keep in view that an obligation to submit is not binding unless the arbiter be named, and alive. Thus, not only an obligation to refer matters in dispute to "impartial persons, mutually chosen," or to "persons of skill," but also an obligation to refer to the person who shall hold any particular office for the time being, is ineffective.[1]

Agreements to refer to arbitration disputes which have arisen, or may arise, must not however be confounded with agreements to have the value of any commodity, or the sum to be paid by any party, where no dispute is contemplated, fixed in a particular manner. This is not an arbitration of a dispute, but the completion of a bargain. So where a tenant bound himself to cede possession at a certain time, on being allowed such compensation for a farther term as should be "fixed by men to be mutually chosen for that purpose," the landlord having resumed possession, it was found that the tenant was bound to adopt the method of fixing the compen-

[1] Magistrates of Edinburgh *v.* Milne; affirmed on appeal, 15th February 1770. Iv. Er. 1015. Buchanan *v.* Muirhead, M. 14593.

sation so set forth.[1] There is a species of reference which partakes partly of ordinary arbitration, and partly of the character of a mere arrangement for fixing the criterion of what shall be given in the way of payment, work, or otherwise, by a party to the contract. Thus, in the building of a house, in the laying down of a railway, &c., a contractor comes under an obligation to complete the work to the satisfaction of an architect or engineer, who may be in the employment of the other party. The few decisions bearing reference to such engagements show that they are strictly interpreted as binding on those who undertake them.[2]

A Submission falls by the death of any of the parties to it. A period may be fixed within which the award must be made. It is not unusual for the submission to contain a blank for filling up such a date, *e. g.* that the arbiters must come to a determination before the day of next to come. By practice, such a submission is held to last for a year.[3] If there is no limitation express, or thus implied, the Submission lasts till it prescribes by the lapse of forty years.[4] According to the principles of the civilians, an arbiter who had once accepted was bound, as a party to a contract, to hear parties and decide; and this principle was formerly enforced in Scotland by the insertion in the Submission of a Clause of Registration to compel the arbiters by letters of horning to perform their functions.[5] It is much questioned if this would now be held law. In a case where one of two arbiters resigned, the court, "without entering into the question, Whether a sole arbiter is bound to decide?" would not in this case exact performance.[6]

Oversman.—It is usual, where more than one arbiter is appointed, to provide for their choosing an Umpire or Oversman in case they cannot agree, or to name a person who is to be Umpire. In the former case the arbiters may choose the umpire before they proceed to business.[7] But "If in either case the oversman shall pronounce a decree before the arbiters have differed in opinion, the decree is null; for the power of determination is in the first place given to the arbiters: it is only upon their disagreeing that it is transferred to the oversman; and the decreet arbitral

[1] Smith *v.* Duff, 28th February 1843. See Munro *v.* Mackenzie, 18th December 1823. Dixon *v.* Campbell, 25th June 1830.—[2] Phipps *v.* Edinburgh and Glasgow Railway, 11th March 1843. Chapman & Son *v.* Edinburgh Prison Board, 16th July 1844.—[3] E. iv. 3, 29.—[4] Fleming *v.* Wilson, 7th July 1827. Halket *v.* Elgin, 16th December 1826.—[5] E. iv. 3, 30. Cairncross *v.* Hunter, M. 632.—[6] White *v.* Fergus, M. 633.—[7] Bryssou *v.* Mitchell, 10th June 1823.

must express specially that the arbiters differed in opinion."[1] It would appear that arbiters are not entitled, on their differing in opinion, to refer the question to an oversman without having express authority to do so.[2]

Judicial Submissions.—It is not unusual in litigations, especially of the class which are likely to come before a jury, for the case to be taken out of court, on a reference judicially ratified. The court in such a case interposes its authority both to the reference and to the decree following on it. The transaction is subject to the rules applicable to Extrajudicial Submissions; and it has been specially decided that a party having agreed to a judicial reference appointing the matter of litigation to be "finally decided" by the referee, he was not entitled to such recourse by new trial or otherwise as he might have had if the cause had proceeded in the ordinary manner, but was bound to accept of a conclusive decision, in terms of the contract.[3]

SECT. 2.—*Decree Arbitral.*

The decision of an arbiter cannot be enforced otherwise than through a decree of a court, unless the Submission have contained a clause of Registration* for Execution.[4] Although it is a rule of practice that Decrees Arbitral are challengeable only on the grounds of bribery, corruption, or falsehood;[5] yet informalities are a too frequent ground for refusing effect to them, and the most usual defect producing this result is the inapplicability of the decree to the submission, in its either not exhausting the matters there set forth, or travelling out of them and deciding on other matters. Whatever may be the dispute which forms the ground of the submission, the decree must be limited to its subject-matter, and must not embrace other questions.[6] If parts of the decree which are competent can be separated from those which are not competent, it may be only partly reduced; but if the whole parts are essentially connected, the whole must be reduced.[7] The arbiter must hear the pleadings of the parties, and it is fatal to a decree, that when it was pronounced, both or either of the parties had not been heard.[8] It does not appear to be a ground of reduction that the arbiter has rejected competent

[1] E. iv. 3, 29.—[2] Matheson *v.* M'Kenzie, 1st July 1842.—[3] Brakinrig *v.* Menzies, 17th December 1841. Campbell *v.* Campbell, 9th February 1843.—* See the head Registration in Index.—[4] E. iv. 3, 31.—[5] Regulations A. S. 1695, § 25.—[6] Napier *v.* Wood, 29th November 1844.—[7] Reid *v.* Walker, 15th December 1826. Ferrier *v.* Alison, 28th January 1843.—[8] Longmuir *v.* Sloan, 21st November 1840.

evidence if he has heard the parties; the method of satisfying himself as to the facts is among the questions which the parties have agreed to leave to the arbiter's judgment.[1] It has been found that a party is not entitled to be *re*-heard; and on the whole the court is jealous of giving any effect to vague statements about insufficient or unequal hearings, or alleged mistakes regarding the real points at issue.[2]

To make a valid decree, all the arbiters named in the submission must be alive and must agree, unless another arrangement be made, by the appointment of an oversman, or by a provision that the majority may decide.[3] In the latter case a decree signed by the majority as assenting to it is valid.[4]

An arbiter may award expenses in his decree without any express power to that effect being embodied in the submission.[5]

CHAPTER III.

FACTORS, AGENTS, AND OTHER MANDATARIES.

SECT. 1.—*Constitution of Mandate or Agency.*

MANDATE is a contract by which one is empowered to conduct to a greater or less extent the business of another. It includes the contracts of Factory, Agency, Commission, &c. The employer is called the Mandant, the person employed the Mandatary. Mandate may be expressed or implied. The latter description is constituted by the usage of trade or by acquiescence;—an implied mandate is constituted by goods being consigned for sale, or by a person being appointed to superintend an establishment, or by a clerk being allowed to perform acts of management, such as drawing and indorsing bills. Agents, Factors, Brokers, &c., are generally appointed in the most important commercial transactions simply by letter. Where the parties are in different countries, it is generally expedient to grant a power of attorney.[6]

---

[1] Ferrier *v.* Alison, 28th January 1843.—[2] Brakinrig *v.* Menzies, 17th December 1841.—[3] More *v.* Grier, M. 14720. E. iv. 3, 34.—[4] Love *v.* Love, 1st June 1825. M'Callum *v.* Robertson, 3d June 1825; affirmed, 1 W. S. 344.—[5] Ferrier *v.* Alison, App. 18th April 1845. 4 Bell, 161.—[6] Paley on P. & A. 155, *et seq.*

The mandatary, having expressly or by implication undertaken to perform the commission assigned to him, is responsible for the damages occasioned by dereliction of duty or carelessness, whether he is to be remunerated or not.[1] The responsibility of a paid agent is of a higher description. He must account with his principal and remit all balances. In remittances (unless he have disregarded special directions) he is not responsible, if he have adopted the medium of a chartered or other bank in good credit, and have followed the usage of trade.[2] An agent for a general merchant abroad is responsible to those from whom he purchases goods on his account in this country.[3] An agent is not responsible for the solvency of the persons with whom he contracts for his principal, unless he have become bound in guarantie.[4]

Extent of Authority.—A general mandatary is restricted only by the usages of trade, and his employer will be liable for all engagements he may come under to that extent.[5] Where, however, the mandatary has been countenanced in acts of management *beyond* such usage, his employer will be liable for his continuing the practice. Thus, where the manager of a coal-work had drawn and indorsed bills, the court (intimating that a power to draw bills did not imply a power to indorse them) found that,—as the mandatary had authority to administer the whole concern, while there was no evidence that money was otherwise provided than by the negotiation of bills, and there was proof that he was in the habit of drawing and negotiating bills,—his indorsement must bind his employers.[6] The departure which an agent makes from the proper accepted method of transacting his employer's business must be very marked to raise the presumption that third parties must be aware of the agent exceeding his powers, or not acting for his principal. A bank-agent had received a deposit, and given the usual receipt as from the bank. Though he wrote to the party a letter, marked " private," intimating that if the receipt were not presented for payment until after a particular date an addition would be made to the usual rate of interest, on the agent absconding the bank was found liable.[7]

---

[1] Paley on P. & A. 6. Gillies *v.* Smith, 9th June 1832.—[2] Russell *v.* Hankey, 10th November 1794, 6 T. R. 12.—[3] Burgess *v.* Buck & Co., 2d July 1829.—[4] Watson *v.* Hood, 2d July 1822.—[5] Paley on P. & A. 198. See Stewart *v.* Hall & Co., App. 10th November 1813, 2 Dow, 29. —[6] Murray *v.* Campbell, 28th November 1827. See Thomson *v.* Fullarton, 23d December 1842.—[7] Craw *v.* Commercial Bank, 9th December 1840.

A person employed to accomplish a specific object is, if not specially restricted, understood to be empowered to employ all necessary and usual means of executing it with effect, and may bind his principal accordingly.[1] Thus, a tavern-keeper was found entitled to recover a large amount of tavern-bills from a candidate for a seat in parliament, they having been incurred by his agent in his name.[2]

A mandatary, whose powers are limited to a certain transaction, or class of transactions, becomes personally responsible for proceedings beyond his commission. Thus, where a shipmaster who was employed to sell fish at Bilboa and account for the proceeds, invested the price in wines, which were lost on the voyage home, he was found liable.[3] Yet even in the case of a limitation the mandatary will be entitled to use a certain discretion in furthering the views of his employer, though he transgress the letter of his instructions. Thus, a factor was employed to purchase 1000 quarters of linseed at 65s. The price rising, it was impossible to purchase at the limits, and he bought 500 quarters at 80s., on which his principal made considerable profit; he was held justified in doing so.[4] Where the authority is to appearance general, third parties cannot be affected by private limitations of which they are ignorant.[5]

SECT. 2.—*Termination of Mandate.*

The authority to accomplish a limited and specific object expires with its accomplishment. Authority to act for another under particular circumstances, and for the sake of temporary convenience (as during bad health, absence, &c.), expires with the circumstance which occasioned it.[6] A general mandate terminates by revocation, if it is known to all the parties interested,—what notice is requisite does not seem to have been decided. "Perhaps," says Professor Bell, "the analogy of the publication necessary in the dissolution of partnership would be followed, namely, special notice, or circular letters to the customers, and advertisements to the world at large."[7] Mandate terminates on the death of the Mandant, which however will not have the effect of annulling transactions entered into before it is known.[8] Bankruptcy has the effect of extinguishing all mandates

[1] Paley on P. & A. 189.—[2] Thomson *v.* M'Taggart, 20th May 1823.—[3] Young *v.* Finlay, 28th July 1716, M. 10088.—[4] Pease, &c. *v.* Smith, 22d May 1821.—[5] Whitehead *v.* Tuckett, 21st April 1812. 15 East. 400. Paley on P. & A. 198.—[6] Paley on P. & A. 184, *et seq.*—[7] B. C. i. 489. See Paley on P. & A. 188.—[8] Campbell *v.* Anderson, 1st May 1829, 3 W. & S. 384.

which may be used to affect the property of the bankrupt, but a factor holding power to sell, who has made advances on goods consigned to him, may indemnify himself from them.[1] It has been matter of much dispute whether insanity, which on the one side precludes the idea of consent to the continuance of a mandate, and on the other extinguishes the power to revoke it, and perhaps renders its continuation more than ever necessary, extinguishes a mandate. It seems to be the opinion of lawyers, that the mandate (especially if limited) would not be extinguished.[2]

SECT. 3.—*The Various Commercial Mandataries.*

Whoever is put at the head of an establishment, domestic or commercial, represents his employer in all things regarding the business of the establishment, not as a delegate with limited powers, but as a representative. "Under this rule in Scotland are included the superintendents of shops, manufactories, farms, banks, and all similar establishments for commercial purposes."[3] When the mandatary is at a distance from his employer however, *e. g.* at the head of a branch of the business,—the public are not entitled to consider his acts binding on his principal unless he be professedly acting in terms of his particular agency. It was so found where an agent for a bank, being himself a banker, granted a receipt in general terms without mentioning his agency.[4]

Commercial Travellers are a numerous and important class of mandataries. Their powers are, if not expressly restricted, limited by the custom of their trade. "In general, it appears that a riding or travelling agent has not only authority to receive payment for his principal of the monies due to him, but to take orders by which the principal shall be bound as much as if he himself had accepted and bound the contract."[5]

A Commercial Factor partakes to a certain extent of the nature of a partner, and sometimes of a guarantor, for the credit of the persons with whom he transacts business for his principal. "A factor is generally the correspondent of a foreign house, or of a merchant or manufacturer at a distance from the place of sale; and he usually sells in his own name, without disclosing that of his principal, and has an implied authority so to do. He receives consignments on the one hand, and makes sales and remittances in return,

[1] B. C. i. 488.—[2] Ibid. 489. Pollok *v.* Paterson, 10th December 1811. —[3] B. C. i. 480.—[4] Watson *v.* Bank of Scotland, App. 26th March 1813, 1 Dow, 40.—[5] B C. i. 481.

proceeding for a considerable course of time, and balancing at regular intervals his accounts with his principal; and in general he gives a *del credere* guarantie, and has a commission for it."[1] As to *del credere guaranties*, *see above*, p. 223. A factor has a general lien, and so is entitled to detain the goods of his principal till he is paid the balance of his account. (*See Part* XII. *Chap.* IV.)

A broker differs from a factor or agent in not having the property of his employers in his hands. He is a person whose trade it is to find out those who wish to perform the opposite parts of a contract,—as a buyer and a seller,—an underwriter and one wishing to be insured,—charging a commission on his transactions.[2] (*See above*, pp. 146 and 197.)

SECT. 4.—*The Factors' Acts.*

Much difficulty having been found by the courts in bringing a regular system to bear on the relative responsibilities of the parties in obligations between factors and third parties, an act was passed in 1825 regulating this matter, which was remodelled by 6th Geo. IV. c. 94, commonly termed the Factors' Act. Another act was passed in 1842, explaining and amending the previous act. The relations of these acts to each other are complicated, to an extent which, considering that they are intended to be read and used by merchants, is very unfortunate; and at the expense of some repetition, it is found necessary on this occasion, to give a distinct digest of each act, instead of interweaving the substance of both.

By the act of 6th Geo. IV. any person intrusted with goods for the purpose of consignment or sale, who ships them in his own name, and any person in whose name goods are shipped, is deemed the true owner, so far as to entitle the consignee to a lien in respect of any money or negotiable security advanced for the use of the person in whose name "such goods, wares, or merchandise, shall be shipped, or in respect of any money or negotiable security, or securities, received by him, to the use of such consignee, in the like manner, and to all intents and purposes as if such person were the true owner of such goods," &c.; provided that at or before the advance the consignee shall not have notice by the bill of lading that the person in whose name the goods

[1] B. C. 477.—[2] Paley on P. & B.

are shipped is not the actual owner. There is a presumption that the person in whose name goods are so shipped has been intrusted with them for the purpose of consignment or sale, the burden of proving the reverse being thrown on the person disputing the presumption (§ 1). Any person in possession of a bill of lading, India warrant, dock warrant, warehousekeeper's certificate, wharfinger's certificate, or other delivery warrant, is held the true owner of the goods it represents, so far as to render valid any contract for the sale, deposit, or pledge in security of advances, of the goods, provided there be no notice, as above, that the holder is not the true owner (§ 2); but if the deposit or pledge be taken as a security for a prior debt owing by the person in possession, then the person taking the goods acquires no farther title than could be communicated by the person so parting with the possession of them (§ 3).

Persons are safe in contracting with agents for the purchase of goods intrusted or consigned to them, the contract being binding on the owner, though the purchaser is aware that he has contracted with an agent, "provided such contract and payment be made in the usual and ordinary course of business," and the party have not notice on entering on the contract, or making payment, that the agent is not authorized to sell the goods or receive the purchase-money (§ 4). Persons may take goods, or warrants for delivery of goods, in pledge, though they receive notice that the persons from whom they receive them are but factors or agents; but no better right can be acquired in such circumstances "than was possessed, or could or might have been enforced by the said factor or agent, at the time of such deposit or pledge" (§ 5). Provision is made for enabling the principal to recover his property from his factor, before sale or deposit, or from the administrator of the estate on his factor's bankruptcy, or to obtain the money from the purchaser in case of sale, subject to the right of set-off between the purchaser and factor, and to recover property pledged on satisfying the claims of the pawnee respecting it (§ 6). Factors or agents pledging goods intrusted to them, and applying the money raised for their own use, "in violation of good faith, and with intent to defraud the owner or owners of such goods," become liable to transportation not exceeding fourteen years (§ 7). The deposit or pledge of goods in security for no greater sum than is covered by the factor's lien is not considered fraud; the acceptance of bills, however, drawn by or

on account of the principal, is not a debt by the principal to justify a pledge in these circumstances unless the bill be paid when it becomes due (§ 8).

The act of 5 & 6 Vict. c. 39, proceeds upon the narrative that under the act of 6 Geo. IV. "and the present state of the law, advances cannot be safely made upon goods or documents to persons known to have possession thereof as agents only;" that advances on security of merchandise have become an usual and ordinary course of business; that the act does not protect exchanges of securities, and that there is much uncertainty in respect of it. It is then enacted that any agent in possession of goods, or of the documents of title to them, is to be held in law as the owner, to the effect of giving "validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent;" and it will not invalidate the presumption, that the person be warned that the individual he deals with is only an agent, provided he have not advice that the agent is acting fraudulently or without authority (§§ 1, 3). The agent is authorized to receive back commodities or titles which have been pledged for an advance, and to replace them with others; but in this case the lender's lien is not to extend beyond the value of the original deposit (§ 2). The documents of title, the possession of which is held to authorize the agent to dispose of the property represented by them, and the transference of which by him is a security to the lender, are bills of lading and others according to the enumeration of the previous act. When such a document is in his hands and is transferred by him, the property represented by it is held as conveyed, though not in the agent's hands. When a contract is made to advance money on indorsation or consignment, the transaction is good, though the indorsation or consignment do not take place at the date of the agreement. A contract made by the agent's clerk or by any other person on his behalf is binding (§ 4).

Frauds.—An agent granting a fraudulent security over his employer's effects is liable to transportation, or to such other punishment by fine or imprisonment, or both, as may be awarded by the court. No agent is punished who takes no more on a security than his principal was owing him, including bills accepted by the agent for his principal's behoof (§ 6). The owner is entitled to redeem his goods while they remain unsold, on satisfying the person who holds them in security, and likewise satisfying the agent to the extent of any lien he may have, if he make any claim (§ 7). There

is a provision to protect the principal from the effects of the agent's bankruptcy, framed with reference to the bankrupt law of England, but which would doubtless be found applicable to sequestrations in Scotland. When the principal redeems his property, he is held a creditor of the agent to the extent of the redemption money from the date of the pledge, and may thus plead compensation to that extent against the agent's creditors. If he do not choose to redeem, he may plead compensation to the extent to which his interest is affected by the deposit (§ 7). Goods which have come into the hands of an agent at any time before the first deliverance in a sequestration against him, thus found a right of compensation or set-off against the agent's claims on his principal.

SECT. 5.—*Law-agent.*

A mandate to a law-agent to conduct a suit, will be presumed, so far as the client is concerned, from his knowing that the suit is carried on in his name, and not disclaiming it.[1] No one, however, living abroad, unless he be a proprietor of lands in Scotland, can sue without appointing a mandatary, who is responsible for the expenses.[2]

A law-agent has a lien or right of retention on the title-deeds and documents of debt of his client, coming into his hands in the usual course of business, for the contents of his account. But a writer who gets a deed into his possession, not as intrusted with his client's writings, but for the accomplishment of a particular purpose, cannot retain it;—so it was laid down where one had contracted a debt to an agent, and allowed him to inspect the titles of a property to judge whether he would accept of a security over it.[3] However pressing may be the occasion for them, the employer cannot recover the deeds for his own use without paying the debt or giving security for it, though they are exigible as evidence by a third party.[4]

An agent in a litigation has a preference over any sum recovered as expenses, which will not be defeated by compensating a debt by his client to the opposite party against it, though it should be maintained that his client is solvent and able to satisfy him. Where, however, expenses have been found to each party in different steps of the litigation, the one set will compensate the other.[5] In the case of a

---

[1] Byran *v.* Murdoch, 13th November 1824.—[2] Darling's Practice, 98.—[3] Chisholm *v.* Fraser, 8th March 1825.—[4] B. C. ii. 113.—[5] Ibid. 36, 37.

compromise the agent will be entitled to extract decree for expenses in his own name, if decree for expenses, or one on which expenses would necessarily follow, have been pronounced, or if collusion to defeat his right can be shown.[1] Although the agent do not take the decree in his own name, by notice to the person against whom it has passed, he has a preference to posterior arresters, but not to prior ones.[2]

CHAPTER IV.

LABOUR AND SERVICE.

SECT. 1.—*Principles of the Hiring of Labour and Skill.*

Risk.—IN those cases where the result of labour is the production of some tangible commodity, the contract of hiring by piece-work is often scarcely to be distinguished from that of sale. To keep it purely within the former, it is necessary to presume that the materials are to be furnished not by the workman but by the employer. In such a case the real property is in the latter, and if the subject perish without blame on the part of the workman, though in his hands, the loss falls on the employer.[3] If the property should perish accidentally in the workman's hands, it may become a question of difficulty how far he is to be paid for the labour he has expended on it. If the work has been completed, he is entitled to be paid the contract price; and, in the general case, if it is partially completed, he may recover a fair remuneration for what he has done.[4] This principle, however, is controlled by the practice of trade. A printer is by custom not entitled to be paid for any part of his work till the whole is finished and delivered; and so when a partially printed book was burned in a printer's premises, he had no claim for remuneration for the work done.[5] When the materials are provided by the workman, and the contract is properly speaking one of sale, the risk is with him until the subject is ready for delivery. (*See above*, p. 159.)

The person employed must give due care to the safety of

---

[1] M'Lean *v.* Auchinvole, 29th June 1824.—[2] Stephen *v.* Smith, 1st June 1830.—[3] B. C. i. 256.—[4] Ibid. 456.—[5] Gillett *v.* Mawman, 5th Feb. 1808, 1 Taunt. 137.

the property, otherwise he will be liable in damages for loss incurred. If the work is unskilfully performed the employer cannot be called on to accept it in fulfilment of the workman's contract, and if the method of the execution lessen the original value of the property, the proprietor is entitled to damages.[1] The workman is responsible for obedience to the instructions he has received; but where there is any doubt, and he is thrown upon his discretion, if he have acted on the whole most profitably for his employer, he will not be responsible for not having sacrificed the interest to the taste of his employer, except under very distinct instructions.[2] If the work is ordinary, and not such as only the person employed can perform, his creditors on his bankruptcy may insist on fulfilling his contract. On the other hand, should it be of advantage to the employer, he can insist on the creditors fulfilling the contract, or on ranking for damages on the estate, being entitled to set off such damage against the price of any work which may have been laid out on the property before the contractor failed. The obligation on the part of the employer is to pay the price of the work. If he fail, the workman is a creditor for the amount, and if the property is undelivered, he has a lien on it* until the price is paid. The creditors of the employer may insist on his finishing the work, they paying the price previously agreed on.[3]

Skilled Labour.—The hiring of skilled labour is connected with some specialties. The person giving himself out as skilled in any profession is responsible not only for ordinary care, but for following the dictates of that knowledge which he gives himself out to possess. Surgeons and law-agents are the persons whose responsiblity in this respect is the most extensive. The responsibility is limited to the adopting of what is generally allowed by the profession to be the proper mode; and damages cannot be incurred, unless a practice condemned by the profession in general is adopted, and causes detriment. The law cannot judge where "doctors differ," or decide upon the merits of professional disputes, by making a lawyer or medical man responsible for the consequence of any measure which part of the profession approve of, although the major part should disapprove of it; and it is thus a sufficient defence that the individual has adopted a plan so far approved of by his brethren that it

[1] B. C. i. 458.—[2] Laing *v.* the Chief Baron, 15th November 1753, Elchies, *Mandate*, No. 4.—* See below, Part XII. Chap. IV.—[3] B. C. i. 457, 458.

may be termed a professional usage.[1] Where there is one proper and safe method of accomplishing what is wished, and no other, the professional man is clearly responsible for any deviation. Thus where an agent prepared missives of sale of a house, and neglected to have them tested (*see above*, p. 137), he was found liable for the damage occasioned by the purchaser taking advantage of his right to resile.[2] Where risk is incurred, economy is no defence; so, where an agent who was employed to make out a security for a sum lent to a dissenting church, omitted to bind the committee of managers or any member of the congregation personally, and the congregation gradually dispersed without paying the debt,—he was found liable, although he seems to have acted on a principle of economy, conformable to a certain extent with the wishes of the parties.[3] An obligation lies on the employer of a skilled labourer to choose, 1*st*, A person so far advanced in his profession as to be presumed capable of conducting the matter on hand. If a surgeon's apprentice be employed to cure a fracture, he will not be responsible for want of adequate skill; 2*d*, He must choose a person who professes his skill to be applicable to the particular department in which he is employed.[4]

SECT. 2.—*Hiring of Servants.*

It is said that writing is not required for a contract of service unless it be to last beyond a year.[5] This can only be said with confidence, however, where it is the custom of the place or the service to engage for a year, and it seems likely that the period to which a verbal engagement will extend would be regulated by such custom. Rural or farm servants are generally engaged year by year, and being in service are understood to be there for the course of the year, whether there is employment during the whole period or not.[6] It has been held, that if the salary be called so much per year, though it be payable quarterly, the engagement is understood to be for a year.[7] The contract is renewed for a second period of customary duration, if the servant remains after the end of the first period without agreement or ques-

---

[1] Maclean *v.* Grant, 15th November 1805.—[2] Currie *v.* Colquhoun, 17th June 1823. See Struthers *v.* Lang, 2d Feb. 1826. Rowand *v.* Stevenson, 6th July 1827. Donald's Trustees *v.* Yeats, 11th July 1839. Campbell *v.* Clason, 16th June 1840.—[3] Sim *v.* Clerk, 2d December 1831.—[4] B. C. i. 459.—[5] Tait's J. P. 459. Fraser on the Domestic Relations, ii. 369.—[6] Tait's J. P. 460.—[7] Moffat *v.* Shedden, 8th February 1839.

tion on either side.[1] Generally if warning is not given some time before the end of the first period, the engagement is presumed to be renewed. This practice is regulated by custom, and the custom will naturally depend on the relative importance of the duties performed, and the consequent difficulty of the one party quickly procuring a new master, the other a new servant. It has been laid down from the bench, that there should always be warning of forty days.[2] Where there was a local usage that there should be no warning, and that a servant not spoken to before the term was not re-engaged, the court would not allow an interference with the general principle of warning, because the usage was not "uniform and notorious."[3] The giving earnest or arles is a matter of local usage. It is laid down by one writer that arles cannot affect the validity of the contract;[4] and by others, that where it is habitual to give arles, the contract can be departed from by either party before it has been given and received.[5] When the contract is verbal it will have to be proved by testimony, and the burden of proof lies on the person founding on the contract.[6] If the opposite party admit the contract, but allege that it was made on a condition not fulfilled, it lies with the other party to disprove the statement.[7]

SECT. 3.—*Rights and Obligations of the Servant.*

There are few contracts in which the relative rights and duties of the parties are less subject to absolute law, and more open to equitable interpretation, than this. The servant becomes bound to enter on service at the time specified; and if he fail, he will be liable to damages according to circumstances. Where no time is specified, the entry will be understood to be at the immediately following half-yearly term of Whitsunday or Martinmas; the former being properly on the 15th May, the latter the 11th November, although some parts of the country adhere to the old style, making Whitsunday on the 26th May, and Martinmas on the 22d November.[8]

If the servant, without good cause, desert his service before the termination of the engagement, he loses all right to wages, and may be made liable to damages.[9] Workmen in

[1] Finlayson *v.* M'Kenzie, 6th June 1829.—[2] Maclean *v.* Fyfe, 4th February 1813.—[3] Morrison *v.* Allardyce, 27th June 1823.—[4] Tait's J. P. 459.—[5] B. P. 173. Fraser, ii. 377.—[6] Ibid. 370.—[7] Forbes *v.* Milne, 17th November 1827.—[8] Tait's J. P. 460.—[9] E. iii. 3, 16.

such cases may be imprisoned by summary conviction, unless they find security to return and implement the period for which they have engaged themselves.[1] Unless, however, under the statutory rules to be hereafter named, imprisonment is not a legitimate remedy for refusal to enter on service according to agreement;[2] and it is stated that "In no reported decision has it been found that the contract can be enforced by imprisonment against a domestic servant, such as footman, butler, cook, or housemaid;"[3] but an exception to this rule is always provided in the annual mutiny act, in favour of such servants as enter the army, who may demand rateable wages for the period during which they have served, to be awarded by a justice of peace, and levied by distress and sale.[4] A servant, disabled by an injury in his master's service, is entitled to his full wages for the period for which he is engaged, independently of any right he may have to compensation.[5] A servant is entitled to damages for any bodily injury he may incur owing to the carelessness of his fellow-servants, or to a defective or pernicious arrangement for conducting the business of the establishment.[6] How far the master is bound to support and continue the wages of a disabled servant will be a question depending on the circumstances. A distinction may be made between an ordinary domestic servant, of whom residence in the house and attendance on the family when he is able are the duties, and the case of a servant hired for a particular sort of work, whose master requires to have a substitute when he is disabled. In one case the master of a farm-servant, hired by the year, was not entitled to deduct wages for eleven weeks, during which his servant was unwell.[7] On the death of the servant during the contract the master must pay rateable wages to his representatives.[8] If the services to be performed by the servant are enumerated in a contract, they will be strictly limited to the enumeration. It is a common opinion that the marriage of a female servant releases her from her engagement, but it is doubted if this be law.[9] In ordinary cases, the duties are to be recognised only by the name of the office, and the general understanding as to its characteristics, as in the case of a butler, gardener, groom, coachman, &c.

---

[1] Raeburn *v.* Reid, 4th June 1824. Gentle *v.* M'Lellan, 9th July 1825.—[2] Tulk Ley & Co. *v.* Anderson, 1st June 1843.—[3] Fraser, ii. 392.—[4] 9 & 10 Vict. c. 11, § 73.—[5] E. iii. 3, 16. Fraser, ii. 398.—[6] Sword *v.* Cameron, 13th February 1839. Fraser, ii. 426.—[7] White *v.* Baillie, 29th November 1794, M. 10147.—[8] E. iii. 3, 16.—[9] Fraser, ii. 398.

Servant's Duties.—Whether the servant has attended to all the duties for which he is understood to have been engaged, or has been ordered to perform services for which he could not be supposed to have stipulated, must always be questions for equitable discretion. A person employed in a particular capacity, such as a farm-servant, is not obliged in the ordinary case to perform services out of his particular line;[1] but there are exceptions to this rule; and there may even be occasions in which a master is justified in dismissing one who has refused to give aid, out of the usual routine of his duties, though certainly the enforcement of any such exceptional rule must be matter of great delicacy. Consideration for the position of such working people as a body, and for those who are engaged together in any particular establishment, suggests a general understanding that it is part of their duty to assist each other on particular occasions. It was found that, where a man had engaged himself as "a spade or labouring hind," and on the occasion of the other servants going to the sacrament, he, having previously attended sacrament in his own parish, was desired to stay at home to attend to the cattle, though it was a service out of his own particular line, on his refusal, his employer was justified in dismissing him.[2]

Place.—A matter which must have a similar dependence on circumstances is the obligation which the servant may be supposed to have come under as to *place*. If a servant is hired in any part of Britain to perform a particular sort of labour in that place in which he was hired, it seems a general rule that he cannot be removed to another place. But a domestic servant must follow the family in any ordinary change of residence, especially in such change of residence as must have been expected from the circumstances, as in the case of a family possessing a town and country house, or two mansions in different parts of the country. But it would appear that a servant cannot be compelled to follow his master abroad, unless he knew his employer had the intention of going abroad before he entered his service. It is doubted if a domestic servant can be called on to attend his master "to distant parts of the same kingdom, permanently at least;"[3] and, undoubtedly, if the servant is so removed without previous agreement, the master must be at the expense of his return to the place where he was hired, so early that he shall be able to enter

[1] Fraser, ii. 411.—[2] Wilson *v.* Simson, 11th July 1844.—[3] Tait's J. P. 462.

on new service immediately at the termination of his former engagement.[1]

The wages of domestic and farm servants are among the debts termed Privileged (*see Part* XIII. *Chap.* I. *Sect.* 1). Servants' wages prescribe in three years; that is to say, a servant has no action for wages three years in arrear, unless he can found on the master's writ or oath. (*See* Index, *Prescription.*)

SECT. 4.—*Rights and Obligations of the Master.*

The first obligation on the master is to receive the servant into his house at the specified period. If he do not receive him, or if he receive him but dismiss him before the first term, or the end of the engagement if there is one, without just cause, he will be liable to pay the servant full wages, and (if the servant had been engaged to live in the family) board wages, or damages.[2] What is a just cause for dismission is matter for discretion. Neglect to perform the duties agreed on or belonging to the situation, absence without leave for an inconvenient period, dissipation, moral misconduct in pecuniary matters or otherwise, and insults to any member of the family, are generally the justification of dismissal. A gardener in Fifeshire was dismissed for having gone to Edinburgh on Thursday and returned on Sunday, having been absent only two working days. He said he had gone on the business of his mistress, but it was proved to have been on his own. The sheriff found that the mistress was entitled to dismiss the servant. The Court of Session decided otherwise, but the decision of the House of Lords corresponded with that of the sheriff.[3] A servant who had taken medicine, and received positive orders from her master not to leave home, went to church. She was dismissed, and the sheriff found the master liable in wages and board-wages. To this the Lord Ordinary adhered, but the court decided otherwise.[4] The law in England appears to be less rigorously favourable to the master. In the case of a courier, hired at £10 per month, and dismissed, it was proved, on the part of the defendant, "that on getting into the carriage, at the stage before Padua, the defendant desired the plaintiff not to stop at a particular hotel, where they had been before, but to drive to another, but that he, notwithstanding, did stop at that hotel, and, when remon-

[1] Tait's J. P. 462.—[2] Ibid. 463.—[3] Crawford *v.* Reid, 13th March 1822, 1 Sh. 124.—[4] Hamilton *v.* M'Lean, 9th December 1824.

strated with, said he had not been told, and at the second hotel appeared to be very sulky; and also, that he had neglected to come, on two or three occasions, when he had been rung for, and was insolent in his manner at Florence." "Mr Justice Parker told the jury that there was a contract for a year, with an implied agreement, that if there was any *moral misconduct*, either pecuniary or otherwise, *wilful disobedience*, or *habitual neglect*, the defendant should be at liberty to part with the plaintiff. His Lordship added, that in his opinion no such conduct had been proved, and that the plaintiff was entitled to his wages for the year."[1]

The right of the servant, if he is unjustifiably dismissed, is said to be to receive wages and board-wages; but it is more properly termed damages, and may in some circumstances be less than wages and board-wages. If he has gone immediately into new service, the emolument thence arising will be deducted, so that he may receive only what he has really lost by being turned from the old. Nay, inquiry will be made whether or not he could have procured employment; and if he has chosen to live in idleness, instead of occupying himself, the damages he is entitled to will be modified. In the case of the fire-stirrer of a glass-house, who had been dismissed, the justices of peace "found it presumed that the pursuer either was or might have been usefully employed for the fifty weeks he was out of service during the time libelled, and found that he could not be entitled to the same wages during that time that he might have been entitled to had he been at work; and therefore modified the wages to the half, and decerned for £17, 10s. sterling;" this was adhered to by the Court of Session.[2] If the master dies during the engagement, the servant is entitled to full wages for the period for which he was engaged; but he must, if called on, fulfil the engagement to his master's representative. If not so called on, he may insist on being allowed to remain in the family, or claim board-wages.[3]

A master is not bound by any law to give a servant "a character;" but if he injure the servant by giving a false character, he is liable to an action of damages for defamation.[4] By statute a penalty of £20 is incurred by any person giving a servant a false character,[5] but it is questioned if the act applies to Scotland.

---

[1] Callo *v.* Brouncker, 13th January 1831, 4 Car. & Pay. 518.—[2] Rae *v.* Leith Glass Co., 20th June 1750, M. 13989.—[3] Tait's J. P. 465. Fraser, ii. 435.—[4] Fraser, ii. 439.—[5] 32 Geo. iii. c. 56.

SECT. 5.—*Apprentices.*

Corporations and societies have generally peculiar regulations for the engagement of the apprentices of the members, to which, if they do not interfere with the law, the court gives effect.[1] The exclusive trading privileges of these bodies are now abolished.[2] The contract must be in writing, and must have the formalities of a solemn written deed.* It must be stamped, and, by the stamp-laws, if the true fee be not stated, the indenture is void.† An informal indenture may be rendered valid by homologation or *rei interventus*.‡ Those who become apprentices being generally minors, the peculiar laws which regulate contracts by persons under age will in the usual case apply.§ If the apprentice be a pupil, he cannot contract, and a parent or tutor will have to take the whole responsibility of his fulfilling the engagement. If he be a minor above pupillarity, without curators, he can bind himself; but if it should turn out that the apprenticeship is inequitable, he may be relieved on the ground of minority and lesion.[3] If the minor have curators, the indenture is void without their consent or acquiescence. Where a minor became bound as apprentice with his elder brother (whom he represented as his curator) as cautioner, and his real curator was not a party to the transaction, but was cognizant of the proceedings, and did not object to them,—the indenture was held good.[4]

The essence of the mutual obligation generally is, that the master becomes bound for a stipulated number of years to keep the apprentice employed in learning his trade or profession in his place of business, sometimes also engaging to board him, sometimes to pay him wages. The apprentice becomes bound to serve and assist the master in his trade or profession, and sometimes engages to advance an apprentice fee. The indenture generally contains a penalty against either party breaking the terms; and there is usually a cautioner who becomes bound under a penalty for the apprentice's faithful performance of his duties.‖ If the penalty in an indenture should be excessive, and far beyond remuneration for damage, it will be equitably restricted by the court.[5]

The duty of the apprentice in attending to his master's

---

[1] Spence *v.* Howden, 12th July 1819, 2 Mur. 167.—[2] 9 & 10 Vict. c. 17.—* See above, p. 133.—† Ibid. p. 143.—‡ Ibid. p. 127.—§ Ibid. p. 38.—[3] E. i. 7, 63.—[4] Harvie *v.* M'Intyre, 7th March 1829.—‖ See above, p. 226.—[5] Wright *v.* M'Gregor, 9th February 1826.

business, and keeping proper hours, much resembles that of a servant; but the authority of the master over his whole conduct is of a more tutorial or parental nature. The apprentice, however, cannot be called upon to perform menial or other duties unconnected with his master's profession, unless they be stipulated in the indenture.[1] So a mason, who kept his apprentice constantly hewing stones, without teaching him to build, was found to have committed a breach of contract.[2] The House of Lords found that a barber's apprentice who covenanted "not to absent himself from his master's business, holiday or week day, late hour or early, without leave first asked and obtained," was not bound to attend to customers on Sunday morning.[3] The master's remedy where the apprentice deserts his service is noticed below (*see* p. 265).

The master, besides the ordinary obligations of employers to servants, engages to show and teach to his apprentice the business of his profession, in so far as he himself practises it. He thus cannot generally do his duty to his apprentice without attending to his business. His performance of this duty however will be called for merely in so far as the absolute interest of the apprentice demands it, and if he have a skilful foreman or partner, his own presence will not be required; as in the case where a wright was constantly absent from his workhouse, and engaged in smuggling transactions, but "the work in the shop was daily carried on by experienced journeymen."[4] The master is not entitled to transfer his apprentice to another unless it be the custom of the trade to do so. To the change of residence of the master, the same rules will probably apply as in the case of servants, holding in mind the obligation to allow opportunity to the apprentice to learn the profession of his master as stipulated.[5]

Enlistment.—By the common law of Scotland apprentices cannot enlist. This principle is limited by the annual mutiny act. It is there provided that no master is entitled to reclaim an apprentice who has enlisted, unless the apprentice had been bound for four years by a regular indenture good at Scots law, which had been produced before a justice of peace, and indorsed by him, with the names of parties and date of transaction, within three months after the commencement of the apprenticeship, and before the enlist-

[1] Peter *v.* Terrol, 26th September 1818, 2 Mur. 28.—[2] Dewar *v.* Millar, 14th November 1788, N. H. L.—[3] Philips *v.* Innes, App. 20th February 1837, 2 S. & M'L. 465.—[4] Gardner *v.* Smith & Wardrobe, 13th July 1775, M. 593.—[5] Tait's J. P. 5.

ment. After desertion the master requires, within one calendar month, to take before a justice of peace an oath prescribed by the act, of which he must produce a certificate. No apprentice can be so redeemed who exceeds the age of twenty-one.[1] If the apprentice have told the magistrate before whom he was enlisted that he was not an apprentice, he is guilty of fraud, becomes liable to serve at the end of his apprenticeship, and, if he do not then deliver himself up to some recruiting officer, may be tried as a deserter.[2]

Apprenticeship to the sea-service is regulated by the Merchant Seamen's Act. (*See the ensuing Section.*)

SECT. 6.—*Mariners.*

The hiring of mariners, and their remedies for the recovery of their wages, are regulated by the merchant seamen's act. It provides that " It shall not be lawful for any master of any ship, of whatever tonnage or description, belonging to any subject of her majesty, proceeding to parts beyond the seas, or of any *British* registered ship of the burden of eighty tons or upwards, employed in any of the fisheries of the United Kingdom, or in proceeding coastwise, or otherwise, from one part of the United Kingdom to another, to carry to sea any seaman as one of his crew or complement (apprentices excepted), unless the master of such ship shall have first made and entered into an agreement in writing with such seaman, specifying what wages such seaman is to be paid, the quantity of provisions he is to receive, the capacity in which he is to act or serve, and the nature of the voyage in which the ship is to be employed, so that such seaman may have some means of judging of the period for which he is likely to be engaged; and that such agreement shall be properly dated, and shall be signed by such master in the first instance, and by the seamen respectively, at the port or place where they shall be shipped, and that the signature of each of the parties thereto shall be duly attested by one witness at the least, and that the master shall cause the agreement to be read over and explained to every such seaman, in the presence of such witness, before such seaman shall execute the same; and it shall not be lawful for the master of any ship to carry to sea any seaman, being a subject of her Majesty, until he shall also have first obtained from every such seaman or other person his register ticket

[1] 9 & 10 Vict. c. 15, § 43.—[2] Ibid. § 42.

(to be procured as hereinafter mentioned), which ticket the said master is hereby required to retain (except in the cases hereinafter provided) until the service of such seaman shall have terminated, and at the termination of such service the said master shall return the register ticket to him." [1]

There is a special form of agreement for vessels proceeding to foreign places, in which case also the master must, within twenty-four hours after his arrival, present the agreement, or a certified duplicate of it, to the collector or comptroller of customs, who retains it till the wages are paid, and then transmits it to the registrar. The ship cannot be cleared inwards till this provision is complied with.[2] There is also a special form for fishing-vessels, and those trading with the Channel Islands, or the coast of the continent between Brest and the Elbe. These agreements are not to extend beyond the subsequent 30th June, or 31st December, or the next arrival of the vessel; and the master must, within twenty-one days after these respective dates, transmit every intermediate agreement, or a certified copy of it, to the collector or comptroller.[3] There are separate pecuniary penalties against the master for the omission of any of the above regulations.[4] If a seaman, after having signed an agreement for a voyage, refuses to proceed with the ship, he may be brought before a justice of peace, and on complaint on oath may be committed to the house of correction for a period not exceeding thirty days.[5] For temporary absence, a mariner forfeits two days' wages, and six days' wages for every twenty-four hours of such absence, or the expense of paying a substitute, at the option of the master; "and in case any seaman, while he shall belong to the ship, shall, without sufficient cause, neglect to perform such his duty as shall be reasonably required of him by the master, or other person in command of the ship, he shall be subject in a like forfeiture in respect of every such offence, and of every twenty-four hours' continuance thereof." [6] A seaman actually deserting forfeits all his wages and all effects he may leave on board, and becomes liable to a summary action for any higher rate of wages paid to a substitute.[7]

Recovery of Wages.—There are statutory provisions for the payment of wages. In the coasting trade wages must be paid within two days after the termination of the agreement, or the time of discharge, whichever may first happen.

---

[1] 7 & 8 Vict. c. 112, § 2.—[2] Ibid. § 3.—[3] Ibid.—[4] Ibid. § 4.—[5] Ibid. § 6.—[6] Ibid. § 7.—[7] Ibid. § 9.

In the foreign trade they are payable within three days after the termination, or seven days after discharge, whichever may first happen; the seaman at the time of discharge being entitled to one-fourth of the balance. The amount of two days' pay is forfeited by the delay of each day, where the whole delay does not exceed ten days. These provisions do not apply to vessels in the Northern Whale Fishery, or in adventures in which the seamen are remunerated by shares. There are summary methods for recovering arrears of wages not exceeding £20.[1] Whenever a seaman has been discharged for three days, on proving to a justice of peace that delay to pay his wages interferes with his fulfilling a new engagement, he may obtain an order for immediate payment, under a penalty, against the owners, of £5.[2] In ordinary cases, a justice of peace, on complaint, and proof by perusal of the agreement and examination of witnesses, after having cited the master, or some owner, may direct immediate payment; and, on failure to comply within two days, the amount is levied by distress and sale against the party, or by execution on the vessel and her apparel.[3]

These statutory regulations do not deprive the seaman of his ordinary legal remedies;[4] but it is specially provided that no action for a sum not exceeding £20 is to proceed in any of the superior courts of law, unless the owners be bankrupt, or the ship be under arrest, or neither the owner nor master resides at the place where the service has terminated, or the magistrate refers the question to a higher court.[5] The mariner's right at ordinary law to receive wages depends to a certain extent on the successful termination of the voyage. It is said to be a general rule that no wages are due where no freight is earned by the vessel, or that "freight is the mother of wages;" but the rule depends on the circumstances which have prevented freight from being earned. Where these have arisen from the acts or negligence of the owners or master, or of persons with whom they have contracted for a cargo, the wages are not lost. Capture defeats the right of the seamen, which revives on recapture. Entire loss by shipwreck defeats the claim; but if any part of the cargo is saved, and freight earned by it, the seaman will have a claim for a proportional part of his wages; and it has been held in England, that seamen are entitled to wages from the proceeds of any parts of the vessel which their

[1] 7 & 8 Vict. c. 112, § 11.—[2] Ibid. 14.—[3] Ibid. § 15.—[4] Ibid. § 5.—[5] Ibid. § 16.

exertions are the means of preserving. Wages are not suspended during embargo or hostile detention.[1]

Master.—The master, being one of the parties on whom is thrown the direction and responsibility of the contracts for the use of the ship, his position is considered in another place (p. 278). With regard to his wages, he is in the general case in the position of an ordinary agent or overseer, but by the act he is entitled to all the rights and remedies to which the ordinary mariners are entitled, if the owners become bankrupt or insolvent.[2]

Apprentices.—Every merchant ship of the burden of 80 tons and upwards must have a certain number of apprentices. Their smallest proportional number is thus regulated: for 80 and under 200 tons, one; for 200 and under 400, two; for 400 and under 500, three; for 500 and under 700, four. Where the tonnage is 700 and upwards, there must be five. The apprentices must be British subjects, and at the period of their entry between twelve and seventeen years of age. A master neglecting the rules as to the apprentices forfeits £10 for each.[3] The justices of peace in the vicinity of any port have authority to adjudicate in claims and complaints by apprentices. When an apprentice has a complaint to make, the master must send him on shore with a trusty person, and in default becomes liable to a penalty of £10.[4] There are special regulations for the apprenticeship of pauper children, which, from their phraseology, do not appear to apply to Scotland.[5]

The merchant seamen's act has provisions for the registration of seamen, rules for the provisioning of the vessel, and medical attendance, &c.; together with certain specific regulations for the conduct and authority of the master, which properly belong to the subject of Marine Police.

SECT. 7.—*Statutory Remedies in Disputes between Employers and Employed.*

By the act for increasing the powers of justices in questions between master and servant, any justice may, on oath of a master or steward, apprehend a manufacturing apprentice, hear the complaint, and award punishment by forfeiture of wages, or imprisonment not exceeding three months.[6] The act does not (it would appear) apply to apprentices

[1] Holt, 266-294, Abbot, 638-644. B. C. I. 513, 518.—[2] 7 & 8 Vict. c. 112, § 16.—[3] Ibid. § 37.—[4] Ibid. § 43.—[5] Ibid. § 32, *et seq.*—[6] 4 Geo. IV c. 34, § 1. 6 Geo. III. c. 25, § 1.

paying more than £25 as apprentice fee.[1] It has, by a subsequent act, been declared to extend to cases where no apprentice fee is paid.[2] The justice may settle any disputes as to apprentices' wages not exceeding £10.[3] In the case of any Farm-servant, Artificer, Calico-printer, Handicraftsman, Miner, Collier, Keelman, Pitman, Glassman, Potter, or other labourer, refusing, if hired by signed written contract, to commence, or (whether there be writing or not) deserting his service, or committing any misconduct, the hirer or his steward may complain on oath to a justice, who, on investigation, may abate the workman's wages, or imprison him for a period not exceeding three months, or discharge him.[4] To facilitate the recovery of the wages of such workmen in case of the non-residence of their employers, justices, on their complaint, may summon the steward or foreman, award the wages (provided they do not exceed £10), and on non-payment within twenty-one days, levy the sum by distress and sale.[5]—N. B. It has to be observed that the act 4th Geo. IV. c. 34, is part of a series of statutes which have been said to be applicable only to England, as they are involved with the operation of the English poor law with reference to parish-apprentices.[6] In several cases, however, it has been taken for granted that the act of 4th Geo. IV. c. 34, applies to Scotland.[7] How far the previous enactments may be put in force here is a matter of doubt.

Truck System.—The act for abolishing the truck system applies to Miners, Quarriers, Saltmakers, Brickmakers, Cutlers, and other workers of Metals, Japanners, Tanners, and Hemp, Woollen, Cotton, and Silk Manufacturers.[8] It renders void all contracts where the engagement is not to pay in the current coin, or where there is a stipulation as to how the wages are to be spent.[9] It is illegal to remunerate the artificer with goods, and such goods cannot be set off against any claim he may make for full wages.[10] Any employer transgressing is liable to a penalty, viz. for the first offence not less than £5 or more than £10, for the second not less than £10 or more than £20, and for the third not exceeding £100.[11] A first or second offence may be tried before any two justices, a third comes properly within the jurisdiction of the Sheriff or the Court of Justiciary.[12]

---

[1] 4 Geo. IV. c. 29, § 1.—[2] 5 & 6 Vict. c. 7.—[3] 4 Geo. IV. c. 34, § 2.—[4] Ibid. § 3.—[5] Ibid. § 4.—[6] Tait's J. P. 4.—[7] Frame & Co. *v.* Campbell, 9th June 1836. White, 21st November 1836, 1 Sw. 344.—[8] 1 & 2 Wm. IV. c. 37, § 19.—[9] Ibid. §§ 1, 2.—[10] Ibid. §§ 3, 4, 5.—[11] Ibid. § 9.—[12] Ibid. § 10.

Arbitration.—Disputes between a master and workman may be referred by any writing under their hands to the final and summary determination of any justice of the peace or magistrate, within whose jurisdiction the party complained against resides. The disputes which may be so referred are, 1*st*, Disputes as to the price of work, whether arising as to payment of wages, hours of work, injury done to the work, delay in finishing it, or bad materials; 2*d*, Where workmen are employed at any new pattern which may require them to purchase any new implements, or alter their old ones, and the parties cannot agree as to compensation; 3*d*, Disputes as to the dimensions and quality of goods, "or, in case of cotton manufacture, the yarn thereof, or the quantity and quality of the wool thereof;" 4*th*, Disputes regarding the remuneration for pieces of goods of any extraordinary length; 5*th*, Disputes in the cotton manufacture as to the manufacture of cravats, shawls, policat, romal, and other handkerchiefs, and the number to be contained in a piece; and, 6*th*, Disputes arising from the particular trade or manufacture, or relative contracts, which cannot be otherwise settled. Complaints as to bad materials may be made within three weeks,—all others must be made within two. If the parties do not agree so to refer the dispute, either of them may complain that the other refuses to settle it; the justice may then summon the party, and, on his not appearing, or not removing the cause of complaint, the justice may be enjoined to nominate referees, consisting of not fewer than four or more than six persons, one-half master manufacturers, or agents, or foremen, and the other half workmen,—the master choosing one from the former, and the workman one from the latter half. If the arbiters cannot decide within three days, they are to refer the matter back to the magistrate, whose decision is final. The acts provide for the enforcement of any other method of arbitration which parties may agree to adopt.[1] It is part of this system that if the workman require it, the manufacturer is bound to deliver to him, with the raw materials, a "note" or "ticket" of work. In the general case, it may be in such form as the parties may agree on; but a particular statutory form is prescribed for the silk manufacture, and it is provided that the ticket when in that form is evidence between the parties of the matters set forth in it.[2]

---

[1] 5 Geo. IV. c. 96. 7 Wm. IV. and 1 Vict. c. 67. 8 & 9 Vict. c. 128.—
[2] 8 & 9 Vict. c. 128.

A series of statutes have lately been passed making restrictions on the employment of persons in manufacturing operations. Their chief object appears to be to prohibit contracts between employers and employed, in which the cupidity of the individuals might induce them to outrage public decency and morals, or tyrannically to exact from persons of tender years an extent of labour injurious to their health and moral training. These statutes belong more properly to the department of Public Police, than to the present which relates to the mutual rights and obligations of Employer and Employed. The acts are 3 & 4 Vict. c. 85, "For the regulation of chimney sweepers;" 5 & 6 Vict. c. 99, "To prohibit the employment of women and girls in mines and collieries, to regulate the employment of boys, and to make other provisions for persons working therein;" 7 & 8 Vict. c. 15, "To amend the laws relating to labour in factories;" 8 & 9 Vict. c. 29, "To regulate the labour of children, young persons, and women in printworks."

PART X.

THE CONTRACT OF LETTING AND HIRING OF PROPERTY.

CHAPTER I.

General Principles of the Contract.

The contract of letting and hiring, or as it is termed by civilians, of Location, has but a very small place in the practice of the law, unless in its two great branches, the law of Shipping and the law of Landlord and Tenant, which on the present occasion have each a separate chapter devoted to them. The few questions that arise as to other instances of the contract, generally relate to the hiring of horses and vehicles. It may be observed that the hiring of labour and service comes according to the divisions of the civil law within the contract of location; but these departments of hiring are so much more intimately blended, in practice, with the other instances, such as Agency and Trusteeship, where individuals perform services to each other, that it has been considered expedient to apply a department of the work to a joint consideration of all these descriptions of contracts of service.*

Erskine observes that the principles applicable to the contract of letting and hiring, are in general those applicable to the contract of sale, it being in reality a sale and purchase of the *use* of a subject. Thus the owner of the commodity —the Lessor, must transfer its temporary custody to the Lessee in terms of the contract, and the lessee must pay the stipulated price or hire.[1]

There are, however, two obligations in this contract which

---

* See above, p. 231, *et seq.*—[1] E. iii. 3, 14, 15, 16.

distinguish it from the law of sale. *First*, the lessee is bound to return the subject to the lessor when the stipulated duration of the hiring has expired. *Second*, he must preserve and return it in sound condition, no more injured through his operations, than it would naturally be by a legitimate application to the purposes for which it is hired.

It is a general rule, that when a party hires a piece of property—as a vehicle or a horse—and returns it to the owner damaged, he is not relieved from responsibility, unless he can show that the damage was not occasioned by his own fault;[1] and he must establish "that the injury sustained could not be prevented by due care and attention on his part, and was occasioned by that in which he was in no respect to blame."[2] This rule was applied in favour of the party hiring, when he showed that a horse and gig had been injured by the backing of the horse.[3]

CHAPTER II.

SHIPPING.

THE method by which property is held and transferred in British vessels has been considered in connexion with the tenure of property and the contract of sale.* The rights and liabilities of the mariners have been noticed in connexion with labour and service.† In another part of the work there will be occasion to notice two descriptions of security connected with this subject, viz. *Bottomry* and *Respondentia*.‡ Another very important contract connected with the navigation laws, viz. Sea Insurance,§ has been separately considered. There are perhaps other portions of the law regarding shipping, which ought, logically speaking, to be discussed under some head different from the present; but as they are all more or less connected with the employment of the vessel, and of the persons connected with it, practical expediency has suggested the propriety of avoiding further subdivision.

[1] Binny *v.* Veaux, M. 10079.—[2] Ibid. Marquis *v.* Ritchie, 11th June 1823.—[3] Pyper *v.* Thomson, 4th February 1843.—* See above, pp. 64, 174.—† See p. 261.—‡ See below, Part XII. Chap. 5, § 3.—§ See above, p. 196.

SECT. 1.—*Responsibility of Owners for Contracts as to the Ship.*

Where the owners themselves enter into a contract for repairs or furnishings to the ship, each owner is liable only for his own proportional share in the contract; but where the furnishings or repairs are on the order of the shipshusband or of the master, any one owner may be made liable for the whole, having recourse against the rest.[1] Although registration is the criterion of right in questions as to ownership, it is not always the criterion of responsibility for furnishings, &c.; the person who consented to the contract, and whose security was trusted to, must be liable. So if a purchaser or mortgagee order repairs to a ship, the seller or mortgager cannot be made liable although his name still appears in the register as proprietor; nor could a purchaser be made liable for furnishings contracted for by the seller before the sale. But if the contract is entered into by the shipmaster, a creditor ignorant of the real ownership, and content to take his chance of it, will have a claim against the persons appearing as owners in the register, who may be able to relieve themselves by the title which the register gives them.[2] It seems to be now held, however—though the decisions formerly left the matter doubtful—that if the person contract with the party who really has the beneficial interest in the ship, knowing him to have it, he will not have recourse against any individual whose name he may find on the register and on whose credit he did not act.[3] The master, by acts in the legitimate course of his duty, may subject the owners to obligations to himself. Where a master (who was part owner) had insured his own effects, and finding it necessary to deviate, wrote to the joint owners to renew the insurance, which they failed to do—they were held liable for the omission.[4] In such cases, moreover, it is necessary to consider for whom the master is presumed to act; and so if the ship have been let on lease, the master is properly the agent for the lessee, who is the person liable for furnishings or other engagements incurred by him.[5] In making a claim against one merely because his name is on the register, it is necessary to show that it has been put there with his own consent.[6] Where a ship has been repaired in a home port,

[1] B. C. i. 519, 520.—[2] Russell *v.* Baird, 13th June 1830. B. C. i. 520, 521. Abbot (by Shee), 33.—[3] Abbot, 33.—[4] Petrie's Executors *v.* Aitchison & Co., 6th February 1841.—[5] B. C. i. 521. Abbot, 33, 42.—[6] B. C. i. 521.

the builder has a lien on the vessel for the repairs; where there is a necessity for repairs abroad, a hypothec may be created.[1] *

SECT. 2.—*Employment of the Ship in Conveying Goods.*

There are two forms in which the services of the ship may be let on hire, *Charter-party* and *General freight.* The former is a contract by which the use of the ship is let for a certain period or a certain purpose; the latter is merely an engagement to carry goods in the ship. In the former case, the vessel is called a *Chartered ship*, in the latter a *General ship.* The former is usually a specific contract, while the latter arrangement is generally accomplished by the ship being advertised to receive all ordinary goods on board, and carry them to the port of destination, without any specific contract between the parties. Both contracts come under the general term *Affreightment.*

In a Charter-party the contract may be for the whole ship or a certain portion of it, or a certain number of tons or barrel-bulks. If a portion of the ship be taken, that portion is entirely at the disposal of the freighter, who must pay the freight or consideration whether the whole space agreed for is filled up by his goods or not. The engagement may be for one or more specified voyages, or for a definite time, and the freight may be so much per ton, or so much per period of time, according to circumstances.[2] The contract does not require to be in writing, it being capable of proof by oath, by testimony, and by circumstances. If committed to writing, it must be stamped. It does not require any particular form. It may contain a clause of registration for summary diligence.[3] The owners and master in the ordinary case become bound by the legal interpretation of the contract, that the vessel shall be seaworthy, and in all respects fitted for the voyage; that she shall be at the port ready for being loaded during a reasonable time; that she shall sail at the appointed day, wind and weather permitting; that she shall be properly navigated, and be directed by the usual and approved course to the destined port; and that the goods shall be taken proper care of, and delivered as directed. The freighter or merchant becomes obliged to furnish a sufficient cargo, to

[1] B. C. i. 526, 527.—* See below, Part XII. Chap. V.—[2] Abbot, 241, *et seq.*—[3] B. C. i. 539.

avoid undue delay in loading and removing it, and to pay the freight at the termination of the voyage or at the time specified.[1]

In a General Ship the obligations of the parties are of the same description, modified by the circumstances. The contract is created by advertisement on the one hand, and acceptance of the terms by deposit of goods on the other. The owners generally advertise the vessel in newspapers or otherwise, stating her voyage, the time of sailing, her burthen, and sometimes her force. These announcements will be held to contain the special conditions, and the others will be presumed by law. The advertisement gives the master the power to accept the goods of those who send them in consequence of the general invitation, and the owners cannot, in the mean time, contract for any other use of the ship, to the prejudice of those who so accept the terms of the advertisement.[2] The chief security possessed by the merchant is the bill of lading.

SECT. 3.—*Bill of Lading.*

The bill of lading, which is the merchant's receipt for the goods which he has intrusted to the shipowners, has become a very important and useful commercial instrument, as a means of effecting an expeditious sale or pledge of the cargo. A bill of lading is given in almost all cases of charter-party, and even in those cases where the ship, being hired for a specified time, is properly under the merchant's own management. In a general ship a receipt is commonly given in the first place by the master or mate for the sake of convenience, and the receipt is afterwards exchanged for a bill of lading.

The bill is an acknowledgment by the shipmaster that certain goods have been intrusted to him in good condition, which he binds himself to deliver at the port of destination. The goods may be specifically described, or they may be merely mentioned as packages with their contents, according to the opportunities which the shipmaster has of knowing what they are; and it is not unusual to insert a clause "quality and contents unknown." The person to whom the master is taken bound to deliver them will depend on the intentions of the shipper or merchant. It may be to the shipper himself, or to his order, or to his assigns, or to the

[1] Abbot, 247-8. B. C. i. 539, 540.—[2] Abbot, 319. B. C. i. 541.

bearer, or to a consignee or purchaser expressly named, or his assignees. This instrument, like a bill of exchange, is negotiable or transferable from hand to hand, as a title to the property for which it is an acknowledgment.[1]

If no one is named as the particular consignee, or person to whom the goods are to be delivered, the shipper may indorse it, as if he were the drawer of a bill payable to himself. He may either indorse to a particular person as consignee, or indorse blank; in the former case, the indorsee may re-indorse, in the latter, the goods are deliverable to bearer. Bills of lading, like foreign bills of exchange, are generally drawn in sets or parts of three, "one of which bills being accomplished, the other two are to stand void." One bill is generally sent by post, one accompanies the cargo, and one remains with the shipper.[2] Meanwhile, the shipmaster assumes the position of a trustee for whoever has right to the bill of lading, and on its being shown to him by any bearer when the bill is blank, or by the person who has a title on its face if it is not so, he must deliver the goods to such holder.*

The person at the port of delivery to whom the bill of lading is transferred by the shipper, may be the purchaser of the goods, or merely the consignee as agent for the shipper, or some other person. Whatever may be his situation, however, he can transfer the bill of lading by indorsation, and so dispose of the cargo before it has arrived, subjecting himself of course to the claims of employers, if he have any.† By this means a purchaser of goods coming from a distant country may sell part or the whole before their arrival, and provide a fund for meeting their payment. When the indorsation of the bill of lading is an onerous transaction, the goods cannot be stopped *in transitu*.‡

SECT. 4.—*Freight and other Charges.*

The freight is the consideration for which the owners of the vessel engage to carry the goods of the merchant, or to allow him for a time the use of the vessel. Two additional charges are sometimes stipulated to be paid along with it, termed *primage* or *hat-money*, and *petty average*. The former is a perquisite to the master, unless it be otherwise disposed of by agreement between him and the owners; the

---

[1] Abbot, 319, *et. seq.*—[2] Ibid. B. C. i. 198, 542-547.—* See as to Bills of Exchange, p. 324.—† See above, p. 167.—‡ Ibid. p. 164.

latter includes several petty charges to cover the expense of towing, beaconage, &c.[1]

If the freight be so much for the voyage, or per cask or package, the chance of the length of the voyage is with the shipowners. If the agreement is for so much per week, month, &c., it is with the shipper.[2] If the shipper agrees for the whole vessel, he has to pay, as already stated, the stipulated freight, whether he occupy the whole or not. "If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, &c., of goods which he shall have laid on board, but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped."[3] Where in such a case the merchant has engaged to provide a full cargo, he will be liable for the deficiency, according to the amount of unoccupied tonnage. Where the whole vessel is agreed for without specification of tonnage, and the cargo is deficient, the amount of freight for unoccuped room will be a question of damages, in which the freight of other goods, taken by the shipowners to fill up the space, will be considered. The sum payable for unoccupied room is called *dead freight*;[4] but though thus termed, it is in reality a compensation to the shipowner for his loss, and is not precisely measured by the freight he would have obtained. In estimating it, any payment saved to the owner must be considered; and so it was found, that where shippers had engaged to furnish a full cargo at so much per ton, in estimating the damages to which they were liable for failing to do so, the amount of "drogherage" or lighterage which the owners would have had to pay was deducted.[5] In a general ship, if there is no stipulation as to the amount of freight, or it is not mentioned in the advertisement, the usage of trade will be the rule.[6]

Where the holder of a bill of lading, containing a clause to deliver the goods on payment of freight, takes delivery accordingly, he will be personally liable for the freight, though he may have purchased the bill of lading with an understanding that he is not responsible. In such a case the shipper, it would appear, is likewise liable, unless there be some specialty.[7] Where the bill is to the charterer or his assigns, "he or they paying freight," the former has been

[1] Abbot, 404, Smith's M. L. 283. B. C. i. 567.—[2] Abbot, 413.—[3] Ibid. 412.—[4] Ibid. 411. B. C. i. 574.—[5] M'Gavin *v.* Cuddy, 19th December 1843.—[6] Abbot, 410.—[7] Smith's M. L. 287. Abbot, 414.

found liable on failure of the indorsee of the bill;[1] and so, where the bill expressed goods to be consigned "*on account and risk* of W. B. to Messrs P. and W. and their assigns, *they* paying freight for the same," it was laid down that the expressions in the bill of lading, which threw the payment on the consignee, are for the benefit of the shipowner, and are not to deprive him of his legal remedy against the shipper.[2]

The freight begins to run from the time when the ship breaks ground and begins the voyage. Whatever trouble or expense may be incurred before this is not remunerated by freight.

The shipmaster has a lien on the goods committed to him until the freight is paid.*

The owners and master of the ship come under an obligation to convey the goods safe, "the act of God and of the king's enemies excepted;" and should the ship and cargo both perish, the freight is part of the common loss, which must be borne by the shipowners. It is a general rule that freight is only due if the voyage has been safely completed, and the goods are delivered at the destined port. But the principle admits of equitable exceptions in practice; so that, in a case of necessity, a different conveyance may be used from that contracted for. Thus, in the case of the ship being lost or disabled during the voyage, the master is entitled to freight if he convey the goods by the best means he can find to their destined port.[3] Where the goods have deteriorated from their own inherent nature, the freight is due in full. Where they have suffered damage from any other cause than the badness of the ship, or careless usage in it, the merchant is responsible for full freight, if he receives them; and in such a case, if the goods reach the port of destination in a damaged state, the criterion of freight will be the merchant's taking or abandoning them.[4] If it be necessary to throw goods overboard to preserve the ship, freight will be due for them, the merchant's proportion of the loss in this, as in other respects, being met by average.[5] (*See below*, p. 280.) If the original port of destination cannot be reached by the shipmaster, on account of blockade or any similar cause, freight will be due if the master so alter the voyage that the owners of the cargo shall derive the full advantage

---

[1] Abbot, 415.—[2] Domett *v.* Beckford, 1833, 2 Nev. and Mann, 374.—
* See below, Part XII. Chap. IV.—[3] B. C. i. 569. Smith's M. L. 284.—
[4] Abbot, 427. B. C. i. 571.—[5] Smith's M. L. 284.

expected; and if he do not succeed in doing so, yet if the merchant accept of the goods after a portion of the voyage is completed, he will have to pay a corresponding portion of the freight.[1] Where the merchant demands his goods before the completion of the voyage, full freight is due.[2] If the voyage have not been commenced, from its being prohibited by government or otherwise, the contract is dissolved, and no freight is due.[3]

SECT. 5.—*Lay-days and Demurrage.*

It has already been said that the merchant is responsible for delays in loading and unloading his cargo. The damage is generally regulated by agreement, or the understood custom of the place. The necessity of having full time to receive and stow away all the cargo, of waiting for convoy during time of war, &c., may make a delay of a certain length convenient for both parties. The days so agreed on, and for which the merchant is not responsible, are called *Lay-days*, and sometimes "Running" or "Working" days; but a farther period is generally stipulated for, during which the merchant may detain the vessel by paying a certain sum of hire per day, called *Demurrage*. The time at which the lay-days for loading commence will be stipulated in the agreement. Those for unloading commence when the vessel has arrived at the usual place of unloading, and not when she has arrived at the entrance of the port.[4]

The number of days of demurrage may be fixed by the agreement, or they may be left indefinite, a charge at so much per day being fixed. In the former case, if the number of days is exceeded, the owners have a claim of the nature of damages against the merchant. The rate settled for demurrage will generally be considered the best measure of the damage, but it will be open to either party to prove the real damage to be less or more.[5] It is no defence to the merchant that he had no control over the circumstances which have caused the delay, if it be not occasioned on the part of the shipowner.[6] In the agreement for lay-days or demurrage, the expression "working days" excludes Sundays and custom-house holidays; "running days" includes every day.[7] Where no specification is made, the custom of

[1] Abbot, 454. B. C. i. 571.—[2] B. C. i. 573.—[3] Ibid. 574. Abbot, 462.—[4] Brereton *v.* Chapman, 14th May 1831, 7 Bingh. 559.—[5] Abbot, 303, *et seq.* B. C. i. 575, 576. Holt, 326.—[6] Abbot, 307. B. C. i. 575.—[7] B. C. i. 577.

the port will rule the period of lay-days and demurrage, or otherwise reasonable damages will be awarded to the shipowners, in fixing which the time necessary for loading and unloading will be considered; but in this case the law so far differs from that where there is a stipulation, that the merchant will not be liable "if the delay be occasioned by the crowded state of the docks, nor where the customary mode of delivery of the particular article requires more time than in ordinary delivery. It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due."[1]

SECT. 6.—*Responsibility of Owners for Safety of Goods.*

It is a general rule that shipowners are liable for all accidents happening to goods under their charge, not caused "by the act of God and the king's enemies." In the bill of lading, the exception generally extends to "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigations of what nature and kind soever." Fire is expressly excepted by statute.[2] There is no liability for gold, silver, watches, and jewels abstracted through theft or robbery, unless they be entered in the bill of lading, or their nature, quality, and value be specially intimated in writing.[3] Shipowners are not liable beyond the value of the ship and freight for embezzlement by persons in their employment or others, or for positive acts, or negligence, occasioning injury to the cargo without their privity.[4]

Seaworthiness, &c.—There are certain obligations on the part of the owners, a departure from which renders them liable for all the consequences which may ensue. The ship must be seaworthy, and fit in all respects to encounter the ordinary perils of the voyage, having a skilful master and able mariners. A defect even unknown, and which has escaped the observation of a skilful surveyor, will occasion liability.[5] So also if the defect should not become palpable till after the voyage has commenced, as where a split broke out in the pump during a voyage, and a box of silk ware near it was damaged by the water.[6] The vessel must be fit for receiving on board and protecting the particular descrip-

[1] B. C. i. 577, 578. See Holt, 327.—[2] 26 Geo. III. c. 86, § 2.—[3] Ibid. § 3.—[4] 7 Geo. II. c. 15. 26 Geo. III. c. 86, § 1. 53 Geo. III. c. 159, § 1.—[5] B. C. i. 550. Abbot, 340, *et seq.*—[6] Lawrie *v.* Angus, 7th November 1677, M. 10107.

tion of cargo. She must not be overloaded, must be furnished with the proper manifest and other papers, and must not be endangered by having contraband goods or false papers on board.[1] In all those parts of the voyage where a pilot is employed by regulation or usage, termed "a pilot's fair-way," a pilot must be employed.[2] It is sufficient that the pilot engaged be one licensed by the ordinary custom of the place. His proceedings must not be controlled by the master, while, on the other hand, the presence of the pilot does not absolve the master from the consequences of injury caused by his own carelessness or want of skill.[3]

Convoy.—In time of war there is generally a stipulation that the vessel is to sail with Convoy, and should there be a legislative provision to prohibit vessels from sailing without convoy, the obligation is understood, without being expressed in the contract.[4] The obligation is to join at the place of rendezvous, and if capture take place on the way thither, the owners are not responsible. After the vessel has joined the convoy, the master is furnished with sailing instructions by the commander of the naval force, and the possession of these instructions will form a part of the evidence that he has endeavoured to abide by the convoy.[5]

The care of the master and the responsibility of the owners do not terminate with what may be strictly termed the voyage. The master must report the ship and crew, and deliver the manifest and other papers. The vessel must be safely secured, and proper measures must be taken for the landing of the cargo. So when it is necessary to employ boats, the responsibility of the shipowners continues till the cargo is landed from them.[6] But previous agreement or the custom of the port may terminate the responsibility before the goods are landed; and so, where it is the custom to discharge into lighters, the responsibility terminates when the lighters are laden.[7]

SECT. 7.—*The Master.*

The master or captain of the vessel, who takes the command and responsibility of the sailing operations, and is, to a certain extent, agent for the owners, is appointed by the majority of owners. The appointment requires no written contract; the nomination and his acceptance bind the parties.[8]

[1] Abbot, 347. B. C. i. 548. Smith's M. L. 276.—[2] Abbot, 345.—[3] B. C. i. 552, 553.—[4] B. C. i. 555. Abbot, 357.—[5] B. C. i. 555. Abbot, 352. Holt, 310.—[6] Abbot, 378. B. C. i. 557.—[7] Abbot, 379. B. C. i. 558.—[8] B. C. i. 506.

In a vessel having British privileges he must be a British subject—as to this, and his duties and liabilities in connexion with the register and certificate, *see above*, p. 65. The master has full power over the motions of the vessel after she has left the port, and may use whatever legal means suggest themselves to him as best calculated for the accomplishment of the voyage. His power to enter on contracts for the employment of the ship is absolute abroad. In a home port it is exercised under the authority of the owners.[1] Where the ship is on general freight (*see* p. 274) he binds the owners in virture of his power of management, by receiving goods on board.[2] The master has full authority to get the ship fitted out, victualled, and manned, in foreign ports, and he may even borrow money, provided the loan is supported by evidence of apparent necessity. In a home port his contracts for repairs and necessaries will bind the owners, unless it can be shown that the contractor knew that such power was not intrusted to the master. In all these cases, independently of the responsibility of the owners, parties will have a claim on the master, unless he specially stipulate otherwise.[3]

The master must give bond, according to a scale proportioned to the tonnage, to return the ship's certificate if she lose her character as a British vessel. If the master is changed the change must be indorsed on the certificate, and the new master must give bond.[4] The master must keep a muster-roll of the seamen, according to the directions of the act for the relief of disabled merchant-seamen, under a penalty of £5.[5] He must observe the regulations of the act for consolidating the laws relating to merchant-seamen (7th & 8th Vict. c. 112). By that act the master forcing ashore or leaving behind any seaman during a voyage, is liable to fine and imprisonment.[6] He cannot discharge a seaman abroad without the written sanction, founded on inquiry, of the principal government officer, or in his absence the principal officer of customs—in a colonial port; or of the British consul, or two respectable merchants, in an alien port.[7] The master of a vessel trading abroad, must deliver to the collector and comptroller of customs a list of the crew, both at departure and return.[8] If the ship be sold at a foreign port, he is bound to find the crew a passage home.[9] The masters of emigrant or other passenger vessels are bound to observe

[1] B. C. i. 506.—[2] Abbot, 156.—[3] B. C. i. 507. Holt, 222. Abbot, 132.—[4] 8 & 9 Vict. c. 89, §§ 23, 24.—[5] 4 & 5 Wm. IV. c. 52, § 9.—[6] 7 & 8 Vict. c. 112, § 46.—[7] Ibid.—[8] Ibid. § 26.—[9] Ibid. § 17.

the police regulations for the protection of the public provided by the act "for regulating the carriage of passengers in merchant vessels," and are liable to penalties for neglect or refusal to obey the act.[1] The masters of steam-boats are in the same manner bound to observe the act 9 & 10 Vict. c. 100.

SECT. 8.—*Average.*

Where a loss is not General Average, as below defined, it is called "*Special* or *Particular* Average,—a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever."[2]

By a very ancient law, which has now been in some form or other adopted in all civilized communities, certain losses incurred for the safety of the whole adventure are proportionally borne by all the parties so benefited. The principle upon which the rule is founded is, that whenever a portion of the ship or cargo is advisedly sacrificed for the safety of the whole, the loss shall not be solely borne by the proprietor, but shall be divided among all for whose benefit the step has been taken; and hence the species of loss so occasioned is termed *general average*. That it should be done advisedly has been held to infer the consent of a majority of those on board, but the deliberate act of the master and crew, or of the master alone, will generally be sufficient, as the circumstances and event, more properly than the form, justify the act. "Previous deliberation, if there be time to deliberate, and a due choice of the heaviest and most cumbersome articles, may be proofs of the necessity and propriety of the act, but they are not the *only* and therefore ought not to be deemed the *essential* proofs."[3] To make the loss average, it is necessary that the remaining property has actually been preserved,[4] and it is a rule that an entry shall be made in the log-book on the return of tranquillity, stating the act and describing the goods sacrificed; and affidavits to the same effect should be made at the first port.[5] When a sacrifice of any part of the property under the care of the master is unadvisedly made, the owners of the vessel will be the losers, either from the property being their own, or from their responsibility for the safety of the cargo. "The goods must be thrown overboard *for the sake of all*; not because

[1] 5 & 6 Vict. c. 107, § 27.—[2] Abbot, 473.—[3] Ibid. 476.—[4] Marshall, 541.—[5] Abbot, 476. B. C. i. 585.

the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight or their presence prevents the extraordinary exertions required for the general safety."[1] Goods stowed on deck have not the benefit of average if thrown overboard, as they are presumed to be an encumbrance.[2] Goods thrown overboard to lighten the ship so as to enable her to get into port are not average. But the case is different if the vessel has been so lightened to enable her to escape from an enemy, to seek shelter from a storm, or to enter a port, to repair such damage caused by a storm or an enemy, as might render the voyage otherwise dangerous. The expenses incurred during the progress of such repairs (viz. in unloading, warehousing, reloading, &c.) are average losses; but in the calculation it will be considered what benefit the ship has derived from the outlay so incurred, and therefore ordinary repairs not necessary for the special safety of the cargo will not be average.[3] Not only the portion of the ship or cargo which may be actually relinquished for the general safety, but the damage occasioned to the remaining portions, by the act, is average; as where the deck or sides of the ship are cut to facilitate the discharge of cargo.[4]

The ship and all the goods on board contribute to average, except the stores and provisions, and the wearing apparel and money of the passengers and crew. The freight is liable to contribute, but not the seamen's wages.[5] In adjusting the contribution, merchandise is valued at the clear price it would have brought at the port of destination, unless the vessel have to return to the lading port, when the invoice price is taken. Ship's furniture is taken at two-thirds of the price of replacing what is lost. An account is then made out of all the articles which have to contribute, the property sacrificed included, and the loss is proportionably assessed on each.[6]

SECT. 9.—*Salvage.*

Salvage is the reward due to those whose extraordinary and voluntary exertions have been the means of saving or recovering a vessel, or her cargo, or any part of either, or of

---

[1] Abbot, 475.—[2] B. C. i. 586.—[3] Ibid. 587. Abbot, 480-81. Marshall, 543.—[4] Abbot, 480-81.—[5] B. C. i. 590. Abbot, 503-4. Br. St. 1008.—[6] Abbot, 505-6. See Stevens on Average, and Martin's Compendium of the Practice of Stating Averages.

the ship's furniture,—as by recapture from the enemy, rescuing from shipwreck, or recovering after abandonment by the master and crew. The master and crew have no claim for salvage in the case of their own ship, because they are bound by their contract to use all exertions for the safety of the property committed to them.[1] Passengers, while they are only considered as exerting themselves for the common safety, in which their own is involved, are not entitled to salvage; but when they make exertions beyond those necessary to their own safety, for the protection of the ship and cargo (as where they could have abandoned the ship, but stay behind and lend their aid), they are entitled to salvage.[2] Nice questions often arise between the right of joint-salvors. It would appear that where a third party gives assistance, the necessity of his so doing, from the apparent impossibility of the first salvor succeeding by his own exertions, requires to be proved;[3] but a curious exception exists in the case of recapture, a ship-of-war being entitled to a proportion of salvage if merely in sight at the time of its accomplishment; "the fate of the capture being often determined by the hopelessness of successful defence; and it being consistently with the duty of a king's ship, the presumption of law, that she has the *animus capiendi*."[4]

The master and crew of a vessel engaged in saving another are the persons properly entitled to salvage, but an allowance is made to the owners on account of risk.[5] In one case a half was awarded to the owners, their vessel having incurred risk by taking the additional cargo on board, and having been so strained as to render repairs necessary.[6] The whole crew of a vessel is entitled to share in salvage, along with those who may be selected to assist the vessel in danger.[7] An act of Queen Anne, if it be not repealed by the act regulating salvage in England, makes provision for obtaining the arbitration of three neighbouring justices as to the amount of salvage in the case of wreck on the coast.[8] Where parties do not agree in such reference, the Sheriff Court or the Court of Session must be resorted to. Where the salvage has occurred on the high seas, the Court of Session is the proper tribunal. In England salvage is regulated by statute 9 & 10 Vict. c. 99. In Scotland, it is left to the operation of the common law.

---

[1] B. C. i. 593. Br. St. 1011.—[2] Abbot, 560. B. C. i. 594.—[3] B. C. i. 594.—[4] Ibid. 595.—[5] Ibid. Br. St. 1011.—[6] The Waterloo, 27th June 1820. 2 Dods, 433.—[7] The Baltimore, 28th February 1817. 2 Dods, 152. —[8] 12 Anne, c. 18, § 2.

CHAPTER III.

LANDLORD AND TENANT.

SECT. 1.—*Subjects.*

THAT branch of the contract of letting and hiring which generally receives the denomination of "the law of landlord and tenant," may be said in general terms to embrace all those portions of property which, from their forming part of the surface of the earth, or being permanently attached to it, can only be enjoyed on the spot where they are. The usual subjects of the contract are,

1. *Land*, either in the form of arable or pastoral farms, or in the minor divisions of parks for grazing, &c., gardens, and orchards.

2. *Mills*, some of which have attached to them an exclusive privilege of grinding the grain of a particular district, termed the *thirl* or *sucken*. The remuneration or tax to the miller is termed the *multures*; it is divided into *insucken* multures, which is the taxed remuneration for grinding; *outsucken* multures, or the remuneration paid by those who, not being astricted, send their corn voluntarily to the mill; and *dry multures*, or a tax paid to the miller whether the grain be ground or not. *Knaveship* or *sequels* are a customary allowance to the miller's assistant. There are different grades of thirlage, as constituted by the original gift, or by prescription, viz. 1*st*, Of *Grana crescentia*, or all corns grown on the lands, not including purchased corn. 2*d*, Grindable corn, or the corn which it is requisite to grind for the uses of the thirl. 3*d*, *Invecta et illata*, or all grain growing within the thirl, as well as all that is brought within its bounds.[1] By statute, the proprietors of lands thirled, or of mills, may, on application to the Sheriff, have the tax commuted into an annual payment in grain, or by the fiar prices, struck by a jury of heritors or tenants of £30 of rent, or of heritors occupying lands of £30 Scots valued rent. Landlords paying the commuted tax may recover it from their tenants.[2]

3. *Minerals*, of which those most commonly leased are granite, freestone, slate, marble, coal, lime, iron, lead, &c.

---

[1] E. ii. 9, 18-38.—[2] 39 Geo. III. c. 55.

Independently of the bare right to work the minerals themselves, such leases generally include appurtenances necessary to facilitate the working, viz. machinery, storehouses, workmen's residences, water for driving wheels, roads, &c. There may likewise be included in such a lease the running of a contract which the lessor has made with the workmen. Leases of salt-works are, in many respects, of the same description as those of minerals.[1]

4. *Woods.* It is, however, a matter of doubt among lawyers whether a conveyance of a right to cut wood is a lease or a *sale;* and it is only in the case of coppice-wood, and others set off in allotments for periodical cutting, that the contract seems to be decidedly considered as a lease.[2]

5. *Fisheries*, which may also be accompanied by the moveable adjuncts of the property, such as nets, cobles, &c., and with roads and edifices. The restrictions under which the right must be held, and the extent to which the exclusive privilege can be appropriated, belong properly to the department of Public Law.

6. *Dwelling-houses and Shops*, which may be let with or without ground attached to them, and accompanied by furniture or otherwise.

7. *Manufactories.* These may be let simply as buildings, or along with machinery, or with machinery and a waterfall to drive a wheel, &c. Steam-power, with the use of the steam-engine itself, is a not unusual concomitant of a lease of manufacturing premises. "The proprietor of a manufactory and steam-engine leases the manufactory, either as a whole or in flats, to dealers, together with looms and similar machinery, or who themselves supply such machinery, while he retains the steam-engine, and, as part of the contract of lease, stipulates to supply them during the currency with the power requisite."[3] In the agreement the quantity of power to be given and required, as connected with the purposes for which it is to be used, should be accurately specified. In the case of two contiguous manufactories, of which the owner of one has agreed to let the other have the surplus power of a steam-engine at a certain rate, it has been questioned whether the contract is a lease or a mere agreement for a supply of power. The question was tried in a case involving pecuniary consequences. The person hiring the power failed, and it was a question whether the proprietor should

[1] Hunter on Landlord and Tenant, i. 261-264.—[2] Ibid. 265-268. Paul v. Cuthbertson, 3d July 1840.—[3] H. on L. & T. i. 278.

continue to supply him while he was in arrear (as would be the case in a lease), or was entitled to give up his part of the contract, when the other party ceased to perform his. The decision was according to the latter alternative, and inimical to the doctrine of the contract being a lease.[1]

SECT. 2.—*Parties.*

Lessor or Landlord.—The absolute and unlimited proprietor of land is entitled to grant a lease of it, on any terms he may think fit. Although he is not infeft (*see above*, p. 55), the lease will be good against himself, or against his heirs, but not against a singular successor, as a purchaser or a person who has attached the property for debt. Should the lessor become infeft *after* granting the lease, the infeftment will have the same effect in validating the contract as if it had existed previously.[2] Inhibition does not bar a proprietor from granting leases.[3] A liferenter cannot grant leases to endure beyond his own life, and it is held that his tenants may be removed at the Whitsunday immediately following his death.[4] In other respects, if his right is not particularly limited, he can grant such leases as will not reduce the permanent value of the property. On this principle the right to lease minerals is so far limited that it may be said not to exist; and unless the liferent be by reservation, it would appear that the only woods which can be validly leased are those allotted for annual cutting.[5] A wife cannot grant a lease of her own property without her husband's concurrence. A lease of such property granted by the husband alone, as his wife's administrator, is only good during his administration.[6] (*See above*, p. 24.) A lease, like any other contract, when entered into by a madman or idiot, is null; while, at the same time, the tutors of such a person cannot grant a lease to extend beyond the period of their own administration.[7] (*See above*, p. 40.) A trustee appointed by a party to manage his estate, or judicially appointed on a bankrupt estate, or appointed by the creditors, is entitled, in leasing the property, to act in the most advantageous manner for preserving its value to those interested, unless his powers are limited by the conditions of the trust.[8] Where the Court of Session appoints a Judicial Factor, in

[1] Auld *v.* Baird, 31st January 1827.—[2] Bell on Leases, i. 99, *et seq.*—[3] Gordon *v.* Milne, 29th February 1780, M. 7008.—[4] E. ii. 6, 21. H. on L. and T. i. 105.—[5] E. ii. 9, 57, 58. B. on L. i. 131. H. on L. and T. i. 106-107.—[6] H. on L. and T. i. 146.—[7] Ibid. 149.—[8] Ibid. 111-112.

the case of a pupil not having tutors, of a person absent who has no authorized agent, and other like cases, the factor is specially entitled to grant a lease, which will last so long as the property is under the inspection of the court, and one year longer.[1] A factor duly empowered by his constituent is in the place of the proprietor, and, except in as far as his commission is limited, is entitled to grant leases to any extent. His commission ought to be in writing.[2]

The right to grant a lease is, in the general case, limited by the rules which apply to individuals or communities in the ordinary administration of their other property. Information on the subject will therefore be found under these heads: Husbands and Wives (p. 23, *et seq.*); Minors and their Tutors and Curators (p. 38, *et seq.*). The limitations placed on heirs of entail, and the statutory bounds placed to these limitations, will be found under the subject of Entails (p. 120). Where the proprietor is insolvent or bankrupt, leases granted by him may be challenged under the law which prohibits alienation of his property to the prejudice of his creditors.* To make the lease objectionable there must be fraud or inadequacy in the rent.[3] The limitations on the authority to grant leases by public bodies belongs in some measure to the subject of Public Law.

Tenant or Lessee.—The persons who are capable of entering on any ordinary contract are entitled to become tenants or lessees. (*See* p. 124, *et seq.*) In the case of a lessee being subject to any legal disability, such as insanity or idiocy, the lease may be reduced for his interest, but not for that of the lessor.[4] It was formerly held that a lease to an unmarried female, excluding assignees, would be void on her marriage, becoming by that act assigned to the husband; but it is now held that if not otherwise stipulated, he can merely become, in so far as the landlord is concerned, the "managing steward" of the tenant.[5] It appears to be questioned whether a wife separated from her husband can become a lessee.[6] The right of aliens to hold leases, formerly in a doubtful state, is now regulated by statute. They may hold leases for a term not exceeding twenty-one years, with all the privileges enjoyed by natives, except that of voting at elections.[7] It would appear that tutors of minors, lunatics, &c., are not entitled to embark the property of their pupils

[1] A. S. 13, February 1730.—[2] E. ii. 6, 21. B. on L. i. 134.—* See Part XIII. Chap. II.—[3] H. on L. and T. ii. 537.—[4] Ibid. i. 171.—[5] E. ii. 6, 31. Gillon *v.* Muirhead, 9th March 1775, M 15286.—[6] H. on L. and T. i. 190.—[7] 7 & 8 Vict. c. 66, § 5.

in leases; but it is presumed, although the point has not been decided, that they are entitled to *renew* leases if they are not of a fluctuating or precarious nature.[1] Leases may be taken by two or more individuals "jointly," each being entitled to joint possession and management, and being liable in full for the rent. The manner in which such leases will be held, or will descend to heirs on the death of any of the parties, will be decided from the terms of the lease, by rules similar to those which govern the succession to heritable property in a like situation (*see above*, p. 90); with this distinction, that the feudal doctrine, that there must be a holder of the fee or absolute property, and that the property cannot be nominally vested in a liferenter, does not apply. If the lease is not taken to any distinct series of heirs, the heir-at-law, according to the rules of succession in heritage, succeeds. The deed of lease may contain a clause empowering the tenant to name his successor. When a tenant names a successor other than the heir-at-law, the landlord, not the heir-at-law, is entitled to challenge it.[2]

SECT. 3.—*Constitution of Lease.*

It is a general rule, arising from feudal usages, that a lease of any heritable subject, as land, houses, mills, woods, &c., must be in writing; but practice has so far modified the rule, that a verbal lease for one year holds good, and a verbal lease for a term of years holds good for one year if possession has been entered on, and becomes annually renewed by possession running into a new year.[3] A writing which simply refers to the circumstance of a verbal lease having been entered into, will not make the verbal lease a written one.[4] But a verbal lease for a term of years may be made effectual by *rei interventus* (*see* p. 127), such for instance as "a grassum paid, or money expended to a great amount in improvements or in building."[5] Thus it was held that "a gardener, who had at a very great expense, on the faith of a verbal lease for nineteen years, converted an arable field into a garden, in which he planted fruit-trees and bushes, was entitled to continue his possession until the expiration of the nineteen years."[6]

A written lease must be a distinct and intelligible obligation, containing the requisites of ordinary probative writs.*

[1] H. on L. and T. ii. 193.—[2] Ibid. i. 195-208.—[3] E. ii. 6, 30. H. on L. and T. i. 348.—[4] H. on L. and T. 346.—[5] B. C. i. 329.—[6] B. on L. i 291.—
* See p. 133.

An unstamped lease bears no faith in judgment.* If the writing is defective, it may be validated by *rei interventus.*† The tenant's simply entering into possession is held as *rei interventus* in this case. The possession must, in the case of land or houses, be practical, or "natural," displayed in occupation of the houses, tilling the ground, &c., by means of the tenant or his subtenants; or, if the lease is of incorporeal subjects, as feu-duties, rents, &c., by collecting and levying them.[1]

Leases good against Purchasers, &c.—A distinction has to be taken between a lease for a term of years, which will be valid against the granter and his heirs, and one which will protect the tenant against "a singular successor," such as a purchaser or a creditor who obtains the property in execution for debt. By our early feudal usages, tenants were held to possess only personal rights which they could not make good against any possessor of the land but him who granted them, or his heir. This was remedied by an early statute, which enacted that "the puir people that labouris the ground" should hold their tacks notwithstanding any change of proprietorship.[2] To bring the lease within the statute, however, it is necessary that possession, as above defined, should have followed upon it.[3] The statute is held to protect only leases of land, or of those rights termed *fundo annexa* or annexed to land, as mills, minerals, fishings, &c.;[4] and in this privilege houses have been included, although let without any adjoining land.[5] "A lease of the profits of a whole estate already under tenantry is not effectual against singular successors."[6] Possession on a lease is compared to sasine (*see* p. 55) in the case of property in land; and so, if two leases be granted of the same subject to different individuals, he who first enters into possession is preferred as tenant, although his lease may have been the posterior in date.[7] A perpetual lease is considered as an alienation, and is not protected by the statute. To render it available against singular successors, there must be an Ish, or period fixed or contingent, when it shall terminate. A lease granted to continue until a debt due by the landlord to the tenant shall be repaid, is considered in the same light as a perpetual lease.[8] But it would appear, that if a period is named, though so far distant that to all purposes, in as far

* See p. 141.—† See p. 127.—[1] E. ii. 1, 22. B. on L. i. 303. H. on L. and T. ii. 415.—[2] 1449, c. 18.—[3] E. ii. 6, 25.—[4] Ibid. 27.—[5] M'Arthur *v.* Simpson, 6th July 1804, M. 15181.—[6] E. ii. 6, 27.—[7] Ibid. 25. B. on L. i. 52.—[8] E. ii. 6, 24. H. on L. and T. i. 455. B. C. i. 68.

as respects the interest of the singular successor, the lease is an alienation, it will be sustained.[1]

Another statutory requisite is that there shall be a stipulated rent. "The rent may be greatly below the actual value, but must not be altogether elusory;"[2] and what will be considered an elusory rent will always depend on circumstances. The rent may be in money, kind, or services. A lease was sustained where the *rent* stipulated was the performance of the smith-work on the estate.[3] Where a lease is renewed or prorogated, its validity against a singular successor will depend on the question, whether the tenant possessed under the old lease or the new, at the time when the land changes masters. If the former, it will be reducible, because at the termination of the lease the property reverts to the landlord, and the new landlord, though he cannot interfere with possession taken, is under no obligation to give possession; if the latter, it will hold good.[4] If a landlord intimate in writing to his tenants, that he is thenceforth to make a specified deduction on their rents, the obligation, if not of a collusive character, is binding on his representatives, and on his trustee if he become bankrupt.[5]

Tacit Relocation, or reletting by sufferance, will be considered as having taken place against a party who has allowed the other to act as if the contract were continued. It only renews the contract for a year. It takes place in favour of the landlord if the tenant fail to renounce forty days before the termination of the lease, or (if it be an agricultural lease not ending at Whitsunday) forty days before the Whitsunday preceding. It takes place in favour of the tenant if the landlord neglect to give warning, or to pursue an action of removing in proper form where warning or action are respectively requisite, or if the landlord have received from the tenant rent in anticipation.[6] Tacit relocation has no place in judicial leases of sequestrated estates, for the court does not warn tenants.[7]

SECT. 4.—*Form of Agricultural Lease.*

Agricultural leases, of course, differ from each other according to the nature of the subject and the views of the parties; but the clauses which are most usually employed,

[1] E. ii. 6, 24. H. on L. and T. i. 455. B. C. i. 68.—[2] H. on L. and T. i. 466.—[3] Lundy *v.* the Smith of Lundy, M. 15166.—[4] H. on L. and T. i. 486.—[5] Lindsay *v.* Webster, 9th December 1841.—[6] B. on L. ii. 132, *et seq.* H. on L. and T. i. 519, *et seq.*—[7] Ibid.

where there is no specialty in the contract, are the following:—1. *Clause of Description of Parties*, in which, besides the principal parties, the cautioner, if there be one, is named. 2. *Clause of Destination*, in which all the limitations and privileges regarding transference of and succession to the lease are specified. 3. *Clause of Possession*, describing the subject, and conferring a right of possession on the tenant. If there be a measurement, but it is not warranted, the tenant must satisfy himself of its accuracy.[1] 4. *Clause of Duration*, stating the continuance of the lease, and the point of time from which it is to be calculated. "The term of entry varies in subjects of different kinds, and in different parts of the country. To an arable farm the term of entry is ordinarily Whitsunday as to the houses, fallow lands, and grass, and Martinmas after the separation of the crop of a specified year, or, more generally after that separation itself, with regard to the rest of the farm."[2] Where the entry is at Whitsunday, there is either a provision that the entering tenant shall labour the fallow land from the previous Martinmas, or that the outgoing tenant shall do so on being remunerated by his successor. If the whole is entered at Martinmas, "there is a provision that the incoming tenant shall pay the expense of the labour on the land that had been in fallow the summer before, and also for the wheat sown,"[3] unless he have been allowed to labour the fallow, and sow the wheat himself. 5. *Clause of Reservation*, specifying those adjuncts of the soil which the tenant has not bargained for, *e. g.* mines and minerals, the right to shoot, &c. 6. *Clause of Meliorations* obligatory on the landlord (*see below*, p. 298). 7. *Clause of Warrandice*, on the same principle as in the disposition to a purchaser (*see above*, p. 168). 8. *Clause of Rent*, containing the amount or some criterion by which it is to be fixed (such as the fiars' prices), if it be payable in money, and the description of produce, with the quantity, if it be payable in kind. Where terms of payment are not specified, Whitsunday and Martinmas are understood. Rent paid before the tenant can reap a crop is termed "anticipated or forehand" rent, and when not paid for one crop until another is reaped, it is termed "postponed or backhand" rent. In this clause is inserted any forfeiture or penalty that may be covenanted for in the case of rent lying unpaid. 9. *Clause of Meliorations* by the tenant, if it be thought expedient to

[1] Hardi *v.* Kinloch, 12th November 1842.—[2] H. on L. and T. i. 362.—[3] Ibid.

bind him to make certain ameliorations. 10. *Clause of Preservation*, stipulating the extent to which the tenant binds himself to keep the buildings, fences, &c., in repair, and restore what may be damaged. 11. *Clause of Insurance*, by which the tenant may become bound to insure the houses, crop, &c., for the preservation of the landlord's property, and of his security for the rent. 12. *Clause of Thirlage*, by which the tenant may be bound to have his grain ground at a particular mill. (*See above*, p. 283.) 13. *Clause of Management.* This is a very important clause, which must vary with every deed. In its simpler form it is an obligation to cultivate the land according to the rules of good husbandry; and, where there are many complicated stipulations, the aim of the whole is simply to prevent the nature of the property from being altered, or the land deteriorated, at the termination of the lease; and to make provision for enabling the next tenant to commence the cultivation with advantage. 14. *Clause of Bankruptcy*, generally providing, either that the lease shall become null in case of the tenant's bankruptcy, or that it shall be in the option of the landlord to resume it. 15. *Clause of Removal*, which dispenses, on the part of the tenant, with some of the formalities of the process of removal. (*See below*, p. 300.) The stipulation is generally fortified by a penalty. 16. *Clause of Reference*, referring disputes which may arise between the parties to the decision of arbiters. 17. *Clause of Mutual Performance*, containing penalties for non-performance on either side. 18. *Clause of Registration* (*see below, Part* XIV. *Chap.* V. § 1). 19. *Testing Clause* (*see above*, p. 137).[1]

Articles of Lease are a sort of code applicable to a whole estate, and embodying "under distinct heads the conditions and regulations under and according to which it is the will of the proprietor that his lands should be cultivated, and by the adoption of which, therefore, the tenants bind themselves to the observance of the course prescribed."[2] The articles are only signed by the landlord. Each tenant enters on a separate lease, which, instead of specifying the routine, &c., refers to the articles, and binds the tenant to adhere to them.

Articles of Roup are the conditions on which the proprietor will allow the lease to be held by the successful bidder at a public auction. Besides specifying the conditions with

---

[1] H. on L. and T. i. 359-374. App. No. 1. See Jur. St. i. 672, *et seq.*—
[2] H. on L. & T. i. 397.

regard to the use of the property, the period of the lease, &c., they appoint the judge of the roup, regulate the method of bidding, and the period during which it may continue. They specify whether caution shall be found by the highest bidder, and whether, in the event of his not finding it, the next is to be preferred, &c. The document is on a stamp, and when a minute, specifying the event, is signed by the judge, and the offerer preferred, it is binding.*[1]

A Rental Right is a method of granting a lease now almost extinct. The tenants were termed Rentallers, or Kindly Tenants, and they were described as "those who are either presumed to be lineal successors to the ancient possessors of the land, or whom the proprietor designs to gratify as such."[2] The only peculiarity distinguishing such a right from an ordinary lease seems now to be that an entry in the landlord's rental-books, written or signed by himself, constitutes the right against him and his heirs; but to make it good against singular successors, there must be a lease qualified by possession and rent.[3]

SECT. 5.—*Assigning and Subletting.*

When the tenant places another person in his own situation, in regard to the unexhausted portion of a current lease, it is said to be assigned, and the deed transferring it is termed an Assignation. Where the tenant still remains bound to the landlord, while he grants a lease of the whole subject, or any part of it, to another person, he is said to sublet. The tenant has no right to exercise either of these privileges, unless by authority expressed in the lease, or presumed from its nature. The most simple method of conferring them is by granting the lease to the lessee, his heirs, assignees, and subtenants. A power to sublet does not warrant assignation, nor does a power to assign necessarily authorize a sublease. The former privilege holds in agricultural leases of "extraordinary duration;" a term which has not been more accurately defined in reference to this subject than that a lease for nineteen or twenty-one years is not presumed assignable, while one for thirty-eight years, being of "extraordinary duration," is so.[4] But the power to sublet has been held to be presumed in a lease of nineteen years;[5] and it would appear, that where the terms of such a

* See as to Auctions, above, 156.—[1] H. on L. and T. ii. p. 405-407.—[2] E. ii. 6, 37.—[3] Ibid.—[4] Ibid. 33, n. H. on L. and T. i. 228.—[5] Duff *v.* Day, 10th March 1769, Hailes, 289.

lease specially exclude assigning, subletting is not understood to be excluded.[1] Liferent leases are held to imply power to assign and sublet.[2] An express exclusion of assignees and subtenants will not affect an assignation or subtack by the tenant to his heir-at-law.[3]

In Urban Tenements, such as houses, shops, &c., where the contract is for simple occupancy, it is now understood that the tenant may assign or sublet unless there is a stipulation to the contrary.[4] The same reason, however, on which the distinction between the two cases rests, will be a ground for prohibiting the tenant of a house or shop from assigning or subletting the premises for a radically different use from that for which they are let to himself, especially if it should be detrimentally so. Thus, a landlord was entitled to prevent a silkmercer's shop from being sublet for the exhibition of wax figures.[5]

Where the exclusion of assignees is only inferred from the nature of the deed, the right of objecting is competent only to the landlord.[6] Where the exclusion is *express*, the matter was held to be doubtful. "It may be questioned," says Professor Bell, "whether an assignment is, in such a case, null, or whether it is only subj ct to an objection on the part of the landlord."[7] It is now held, however, that it is in the latter position,—that the landlord only can object, and that if he acquiesce, the assignation is effectual.[8] It is not unusual to insert a clause excluding assignees, "unless with the special consent of the landlord," or admitting them, "if approved of by the landlord;" and though formerly the landlord was held to be under judicial control in objecting, and bound to show cause for doing so, it has been decided that his right to object is purely arbitrary.[9]

To preserve the interest in an assigned lease from the creditors of the original tenant, or from a posterior assignee, there must be possession under the assignation.[10] The possession may be either by the assignee or his subtenants.[11] No assignation of a lease in security can be made effectual against creditors, by an arrangement by which there is no apparent change of ownership, the original tenant becoming nominally the subtenant of the assignee, but continuing to

---

[1] Iv. Er. 368.—[2] E. ii. 6, 32. H. on L. and T. i. 228.—[3] E. ii. 6, 31, n. H. on L. and T. i. 237.—[4] B. C. i. 76. H. on L. and T. i. 229.—[5] Leechman *v.* Sievwright, 6th June 1826.—[6] H. on L. and T. i. 241.—[7] B. C. i. 77. See E. ii. 6, 31.—[8] H. on L. and T. i. 241.—[9] B. C. i. 78. H. on L. and T. i. 241.—[10] Hamilton's Trustees *v.* Stewart, 25th May 1830.—[11] B. C. i. 67. See H. on L. and T. i. 487-492.

occupy the premises and pay the rent to the landlord.[1] When a landlord has given a formal written consent to an assignation of a lease, he is not bound to look to the original lessee as his tenant, on the mere ground of an arrangement between him and the assignee for the restoration of the former to his position as tenant, to which the landlord is not a party.[2] This rule, conjoined with the want of any such system of registration in the case of leases as that which has so long been in practice as to heritable property, prevents the tenant's interest in leases from being easily convertible into a safe security for a loan.†

SECT. 6.—*Fixtures.*

Fixtures are those adjuncts of the subject of the lease which a new tenant is entitled to consider as part of the commodity he has agreed to hire, and which, on the same principle, an outgoing tenant cannot remove, though they may have been erected at his own expense. There is no class of subjects of which it is more difficult to give a brief definition. They are classed as under:—"Whatever is requisite to render the premises, as such, entire and complete by being either inseparably attached, or so constructed and fitted as necessarily to establish the intention of being for perpetual use, is a fixture; while, whatever is calculated merely to furnish the premises, by being separable and designed to be separated, is not a fixture."[3] The cases, however, in which the question has been tried, have been generally those between a landlord and an outgoing tenant, and the law has usually been guided, not so much towards any fixed physical definition, as to a practice which may prevent undue loss on either side. The tenant having spent money on articles which increase the value of the subject, the general aim has been, not to permit the landlord to make profit by his expenditure, on the one side; and on the other, not to allow the tenant to hurt the subject let to him by removing additions which, though unnecessary, when once made, cannot be removed without injuring the subject. In urban or agricultural leases, a building of any description erected by the tenant cannot be removed by him. The tenant is not bound to leave such an erection in good repair;

[1] See Law of Bankruptcy, &c., p. 238.—[2] Ramsay *v.* Commercial Bank, 20th January 1842.—† To remedy this defect a bill was brought in, in the session 1837-8, and again in the session 1838-9. It appears to have been subsequently abandoned.—[3] H. on L. and T. i. 290.

but if the landlord objects to its continuance, the tenant is bound to remove it.[1] While the edifice of a thrashing-mill is a fixture, it has been judicially admitted that the machinery is not so.[2] Where racks, mangers, &c., had been put up temporarily in a cottage not regularly used as a stable, they were held not to be fixtures; but it appears that had the edifice been intended as a stable, the decision would have been different.[3]

Where premises are let for trading purposes, and the tenement may be less valuable than the adjuncts, a rule more favourable to the tenant has been established than in agricultural leases and those of dwelling-houses. In England, in such cases the established practice has been to consider vats, coppers, furnaces, engines, &c., called "trade-fixtures," as moveable. "The inference to be drawn from the several cases is, that a tenant has an indisputable right to remove fixtures which he has annexed to the demised premises for the purpose of carrying on his *trade*, and that the *benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence."[4] In leases of houses, or ordinary urban tenements, the distinction is ruled to a great extent by local usage, subsidiarily to the general rule that what is part of the building is fixture, what is furniture is moveable. In some districts shrubs in gardens are fixtures; in others they are not so. It is held "that hangings, chimney glasses, and pier glasses, although said to be as wainscot, being fixed with nails and screws to the freehold, and that there was no wainscot under them, are matters of ornament, and do not go with the house."[5*]

SECT. 7.—*Meliorations.*

Meliorations are those improvements of the property let on lease, which either party may stipulate for the performance of, or which must be executed in course of law without stipulation, during the currency of the lease. The tenant is bound, without stipulation, to leave all buildings, fences, &c., in the state in which he got them as to repair, but the landlord cannot increase the tenant's obligation in this re-

---

[1] Thomson *v.* Oliphant, 8th February 1822. Iv. Er. 372. B. on L. i. 243.—[2] Glassel, &c. *v.* Howden, 22d February 1825.—[3] Scott *v.* Ewart's Representatives, 1st December 1824.—[4] Amos and Ferard on Fixtures, 27. See also Gibbons on Fixtures, 22, *et seq.*—[5] H. on L. and T. i. 301.—
* See as to the difference between Heritable and Moveable Subjects with reference to other questions, above, p. 45.

spect by additions made during the currency of the lease. There is a particular exception, however, in the case of march-fences, which the tenant is obliged to keep in repair, although they should be erected during the currency of the lease.[1] It is a general rule that whatever additions or improvements the tenant may make are held as made to suit his own purposes, and the landlord is not bound to remunerate him at the expiry of the lease, except on stipulation. If the addition is not a fixture, as above defined, the tenant may remove it. It would appear, as above, that the tenant may be compelled either to put it in repair, or to remove it. Destruction by fire, the hand of an enemy, or convulsions of the elements, releases the tenant from his obligation to keep in repair. For the damage done by an ordinary storm he has no such relief. It is difficult to draw the line between the two cases.[2]

In the case of houses, shops, &c., there are few decisions on the subject of meliorations. The landlord is held bound to keep the subject in proper condition, and if he fail to do so, the tenant may make necessary repairs, and claim remuneration for them at the end of the lease.[3]

Stipulation.—Where there is a stipulation as to meliorations, it is often a subject of question, 1*st*, Whether the works claimed as meliorations are more than ordinary management and keeping in repair; and, 2*d*, Whether the meliorations made agree with those stipulated for. Thus, "an expensive and effective course of liming, although permanently beneficial, yet, when applied to land already under cultivation, is management and not melioration. But if moorland be rendered arable, and become a lasting source of benefit to the estate, melioration may be deemed to have been effected. If, however, there shall be no permanent advantage, the contrary will hold."[4] It is a not unfrequent stipulation that the tenant shall be bound to uphold the houses, steading, fences, &c., and that the landlord shall be obliged to pay him any sum to the extent of which they may be more valuable at the termination of the lease than they were at the commencement. In such a case it was decided by the House of Lords, reversing the decision of the Court of Session, that the tenant "is entitled to meliorations for houses and biggings, in so far as the houses and biggings on the farm, at the date of the tack, are improved,

[1] B. on L. i. 243. Iv. Er. 371. H. on L. and T. ii. 218.—[2] B. on L. i. 239. H. on L. and T. ii. 218.—[3] H. on L. and T. ii. 218.—[4] Ibid. ii. 236.

or others suitable to the farm built in lieu of the same, and better than the same, at the expiration of the tack; and that he is not entitled to meliorations for houses and biggings built of new, except as aforesaid."[1] This decision having been applied to the specialties of the case by the Court of Session, after a proof, the difference in value was awarded where old buildings had been repaired or new ones substituted. Thus, in the case of the dwelling-house, the estimate of the original house being calculated at £150, and the value of the house left at the termination of the lease at £254, the difference was allowed.[2] The meaning of the terms used in clauses of melioration will depend on the usage of the district. Where a lease in Aberdeenshire specified that the dwelling-house was to be entered at so much in the "lying inventory," or the landlord's general inventory, and "to be valued at his [the tenant's] removal," the court, on a proof, the result of which was that no district-practice as to such cases could be identified, allowed the tenant the difference in value.[3]

SECT. 8.—*Various Methods in which Leases may be Terminated.*

A lease may be brought to a conclusion before the stipulated period by the mutual agreement of parties. It is then said to be renounced. The consent of the parties should be in writing. It cannot be proved by witnesses, but it would appear that it may be referred to oath.[4] Renunciation may be implied by the tenant possessing on another lease of the same lands differing from the former in some material point, as rent, duration, &c. It is an essential of the presumed renunciation of the prior tack that the new one is valid and effectual.[5]

Leases sometimes contain a clause allowing some one, or either of the parties to resign at a certain stage of the lease on warning, the condition being fortified by formalities, as "the presence of a notary-public and witnesses," and provision being made for the interest of the landlord by the farm being left in good condition, should the tenant be the person who takes advantage of the clause; and for the

[1] Graham *v.* Jollie, 29th June 1831, 5 W. and S. 280.—[2] Same parties, 24th June 1834.—[3] Gammell *v.* Andersons, 9th December 1836.—[4] H. on L. and T. ii. 25, 26.—[5] Ibid. ii. 104, 105.

interest of the tenant, should it be the landlord who does so.[1]

Irritancy.—A lease may be brought to a close by its being forfeited or irrited to the landlord through the conduct or circumstances of the tenant. Irritancies are legal or conventional.

Legal Irritancy.—In ordinary leases if a tenant has run a full year's rent in arrear (the *amount* of a year's rent, made up either of the whole of one, or of parts of several years' rents), or if he desert his farm, and leave it unlaboured, the landlord may raise action before the sheriff, who may decern the tenant within a limited time to find caution for arrears, and for the rent of the five following years, or, if the lease is of shorter duration than five years, for its currency; failing in which the tenant is summarily decerned to remove.[2] It was found that a tenant might suspend a decree of removing, he having in the mean time got decree against his landlord for damages, which placed him in the position of not being due the year's rent.[3] The dubious clause as to deserting the ground has been generally interpreted favourably to tenants, and has been found to infer a real intentional desertion, or such desertion, if arising from accidental circumstances, as may have been really detrimental.[4] Where two years' rent shall have been suffered to "run into a third," or lie in arrear, an irritancy may be declared before the sheriff, who, on finding it to have been incurred, decerns in a removing.[5]

A Conventional Irritancy is founded on the terms of the lease, and is generally more strictly interpreted than a legal irritancy. It is frequently stipulated that an irritancy shall take place "if one whole year's rent shall remain unpaid after the term of payment specified," or "if two years' rent shall be allowed to run into the third unpaid." The advantage which a landlord may have by a conventional irritancy of the same terms with the legal irritancies is, that it is not "purgable at bar," or that the tenant cannot be reponed by fulfilling the conditions after the process against him has commenced, and before decree has been extracted for execution.[6] There are various other conventional irritancies, such as non-residence, departure from the assigned method of management, the bankruptcy of the tenant, &c. Without

---

[1] Jur. St. i. 677. H. on L. and T. 502.—[2] A. S. 14th December 1756, § 5. R. L. ii. 545.—[3] Graham *v.* Gordon, 16th June 1843.—[4] R. L. ii. 546.—[5] A. S. 1756, § 4.—[6] H. on L. and T. ii. 136-142.

such a clause bankruptcy does not affect the contract; the bankrupt must assign for behoof of his creditors if the lease is assignable, and if not, he may continue as tenant, and manage the farm for their behoof.[1]

SECT. 9.—*Obligations to Remove.*

It is not unfrequent for the tenant to come under an obligation to remove, either as a stipulation in the lease, or by a separate agreement. It is an engagement which can apparently be proved by the oath of party, but, like a renunciation, not by the testimony of witnesses.[2] The effect of this obligation is not to render unnecessary a process of removing, but simply to be a substitute for the warning. (*See below*, p. 301.) Where the obligation to remove has been engrossed in the lease, the landlord presents to the Court of Session a bill or petition accompanied by the lease, praying for letters of horning, containing a charge to remove in terms of the act of sederunt, 14th December 1756. Where a tenant without a written lease had intimated more than forty days before Whitsunday that he was to leave the farm, it was found that he might be removed without warning.[3] Letters of horning are granted, the will or judicial command of which directs the proper officer, forty days before the Whitsunday of the year in which the lease is to terminate, to warn and charge the tenant personally, or at his dwelling-place, to flit and remove with his wife, bairns, &c., certifying that if he do not remove at the proper term, he will be liable to penalty as a violent possessor. On the arrival of the term the landlord produces his tack and horning, with the officer's execution to the sheriff, who, within six days after the term, grants warrant to the proper officer to go to the house of the tenant and turn out the inhabitants and furniture, and extinguish the fires.[4]

It may be a subject of question how far the procedure admitted by the late act, amending the form of diligence (1st and 2d Vict. c. 114), may be applicable to the enforcement of obligations to remove. The alteration which that act has made in cases of ordinary diligence for recovery of debts and enforcement of obligations, is considered elsewhere.* As, however, the new act only makes an alternative, leaving

---

[1] H. on L. and T. ii. 127, 537.—[2] Iv. Er. 382.—[3] Heddle *v.* Baikie, 16th January 1841.—[4] A. S. 14th December 1756, § 1. R. L. ii. 541. H. on L. and T. ii. 33, 34.—* See below, Part XIV. Chap. V.

parties to follow the old form in cases of difficulty, the law-agent who may doubt how far it is applicable, will have it in his choice to adopt the accustomed form.

The special provision in the act of sederunt does not deprive the landlord of his right at common law to raise an action on the obligation to remove, which he may pursue in the Sheriff Court,—where the obligation to remove is separate from the lease, indeed, he can only employ it as a ground of action, as it cannot be a foundation for a charge of horning.[1]

SECT. 10.—*Judicial Removings.*

The process of judicial removal, now in almost universal operation, was introduced by the above-mentioned act of sederunt of 1756. It did not abolish the previous practice of removings under the statute 1555, c. 39; but that process requiring many petty formalities, any imperfection in which invalidated the proceeding, it has fallen into general desuetude.

By the ancient form the landlord grants a precept of warning, which is executed against the tenant personally or at his dwelling-place, and at the ground of the lands; and must be affixed to the church-door, and read to the people attending service. This warning must be executed forty days before the Whitsunday of the year in which the lease is to expire; and if the lease should terminate at any other term than Whitsunday, the warning must be made forty days previous to the Whitsunday preceding the term of removal. If the tenant do not obey, the landlord raises action against him before the Court of Session or the Sheriff, concluding that the tenant shall be decerned to remove. If the action be before the Court of Session, the decree will be made effectual by a Charge and Letters of Ejection. If it be in the Sheriff Court, the decree will be put in force without delay, by a Precept of Ejection.[2]

Under the Act of Sederent of 1756, the landlord raises an action by summons before the Sheriff, which must be called in court forty free days before the Whitsunday at which the lease expires, or if it expires at a different term, before the Whitsunday previous to that term. This action comes

---

[1] Stevensons *v.* Baird, 23d June 1821. H. on L. and T. ii. 37.—[2] 1555, c. 39. E. ii. 6, 45. R. L. ii. 529, *et seq.* H. on L. and T. ii. 42, *et seq.*

in place of the warning of the old statute, and the Sheriff having given decree in the action, followed by a decree of ejection, the removal of the tenant is completed as in the other cases.[1]

Summary.—Persons who have been tenants, but whose leases have expired, are entitled to warning or action of removing, but not so those who are merely accidentally on the premises of which they have not been tenants. So the heir of a liferent tenant may be removed summarily, immediately on the death of the liferenter, though between terms.[2] But if the lands have been sublet, warning must be given.[3] The tenant of a manse or glebe may be removed on the incumbent's death.[4] By a late act summary removings may be brought before the Sheriff, in the case of houses or lands let for less than a year at a rent not exceeding the rate of £30 per annum. The tenant is cited to appear, decree is given in his absence if he do not, and if he have any defence, it can only be pleaded, in such case, on his paying expenses.[5]

Burgal.—The removings from tenements within burgh are generally termed summary, because the act 1555, and act of sederunt 1756, do not apply to them, and the formality, if any, is chiefly regulated by the custom of the burgh. It is necessary that there should be warning, verbal or written, and (it would appear) this warning ought to be given forty days before the term of removal. It is customary in some burghs for a burgh-officer, forty days previously to the term, to warn the tenant, and mark the door with chalk. If the tenant do not remove, a complaint or summons of removing must be raised against him before the magistrates. Upon the decree a charge is sometimes given, and thereafter a warrant of ejectment, but the procedure appears in general to be very irregular.[6]

The rules as to solemn warning do not apply to country houses without land attached to them, nor does it appear that formal warning of any sort is requisite, if timely notice be given. Small tenements with patches of ground are in the same position, though the line is not precisely drawn; formal warning was found unnecessary where there was a garden less than a quarter of an acre, and the rent was £5.[7]

---

[1] A. S. 14th December 1756, § 2. R. L. ii. 542. H. on L. and T. ii. 79.—[2] H. on L. and T. ii. 82-84.—[3] Ibid. ii. 63, 64.—[4] Ibid. ii. 84.—[5] 1 & 2 Vict. c. 119, §§ 8, 9.—[6] R. L. ii. 551, *et seq.* H. on L. and T. ii. 86, *et seq.* —[7] Chirnside *v.* Park, 8th March, 1843.

Mineral leases appear to be in the same situation.[1] Formal warning is not necessary in leases of feu-duties, port-customs, and grass parks. In the last case intimation seems to be unnecessary.[2]

---

[1] Hunter, 1188.—[2] Ibid. 90, 91.

PART XI.

BILLS OF EXCHANGE AND OTHER NEGOTIABLE OBLIGATIONS.

CHAPTER I.

Form, Nature, and Requisites.

Sect. 1.—*Description and Definitions.*

Bills of Exchange and Promissory Notes are applied to numerous and very important commercial services. They constitute securities for debt, are the instruments of transferring money from place to place, or of shifting an obligation from one person to another; they are often used by merchants as cautionary obligations, and are still more frequently the means by which one man of business assists another with his direct credit. A great part of the usual currency of the kingdom is in the shape of bankers' promissory notes; and in Scotland by far the greater portion of the money which passes from hand to hand in sums of pounds sterling, is in that shape.

A Bill of Exchange is a precept or mandate addressed by one person to another, directing him to pay to the person who makes the demand, or some other person named, or to the bearer, a sum of money, at sight, or on demand, or at a fixed time.

A Promissory Note is an obligation in similar terms, simply promising to pay, without a preparatory mandate.

Parties.—In a bill of exchange the person who signs the mandate is called the *Drawer*, he to whom it is addressed is called the *Drawee*, the person to whom the sum of money is to be given is called the *Payee*,—the *drawer* may of course be *payee*. When the drawee signs the bill, acknowledging his

liability for the contents, he is said to *accept* it, and from that period the term *Acceptor* is applicable to him. In a promissory note the two parties are termed *Maker* or *Granter*, and *Payee*. Whoever stands for the time entitled to receive payment of a bill or note is termed the *Payee, Holder*, or *Porteur*. A bill of exchange is not a complete negotiable document until it is signed by the acceptor; though it may, as hereafter will be seen, support a claim against the drawer without being so. A promissory note is complete from the moment of its being signed by the maker.

Inland and Foreign.—Bills of exchange are either Inland or Foreign. They are the former when the Drawer and Drawee are in the same country—the latter when they are in different countries. In England the distinction is of more importance than in Scotland, inland bills being there held not to require protest. (*See below*, p. 319.) In Scotland there is a difference between the two sorts of bills, as to the time within which notice of dishonour should be given (p. 320), and to this end bills between England and Scotland are held to be foreign. Bills between Great Britain and foreign countries are generally drawn in sets of two or more, each being a repetition of the others, with the exception of a number to distinguish it. By this expedient, if one is lost in the passage, another may be made use of, and to this end each bill bears to be payable only on condition of no other of the same tenor and date having been paid. Foreign bills are frequently made payable at "usance," a period, the length of which, as between any two places, depends on commercial usage.

Checks or *Drafts* on Bankers bear a considerable internal resemblance to bills of exchange. The two kinds of document differ from each other in this, that the draft is merely a direction to the banker to pay the money deposited with him; the bill is an order to a debtor or presumed debtor to pay the money which he owes or may acknowledge himself to owe to the drawer. The chief practical distinctions between them will be considered under the head of stamps, p. 308.

Bills, notes, and drafts are transferable, so as to enable a payee to put any other person in his place. In England, to enable this to be accomplished where the payee is named, there must be negotiable words on the face of the bill, such as "or order," "or bearer;"[1] but in Scotland, special words

[1] Ch. on B. 196, 197.

are required to *restrict* the transferability.[1] A bill or note payable "to bearer," or with the payee's name blank, or with his name followed by the words "or bearer," may be transferred by mere delivery. If payable to a person named, with or without the words "or order," they may be transferred by indorsation. If blank indorsed, they are transferable by delivery. There is considerable difference, however, between the rights carried by indorsement and those transferred by mere delivery. (*See below*, p. 324.) Bank notes are generally transferred from hand to hand as cash. They are not, however, a legal tender—that is to say, a creditor for a sum in cash is not bound to receive the notes of any bank in satisfaction of his debt. Formerly the notes of the bank of England were a legal tender in Scotland, but they are not so now.[2]

SECT. 2.—*Form.*

Bills and notes require no particular form, but it is by no means safe to depart from the usual arrangement of words which custom has prescribed. A bill must contain a distinct mandate, and a note a distinct promise to pay money; the person who is to pay and the sum to be paid must be distinctly told, and the time of payment must either be stated, or ascertainable beyond a doubt from the terms of the bill. A *request* to pay money is not a bill, for the law presumes the drawer to be the creditor of the acceptor, and the bill to be an absolute mandate to pay.[3] The interposition of a condition, or a bargain, will deprive the document of the privileges of a bill.[4] It is of great moment to its efficacy that the bill should be a clear correct written document, free of blanks, interlineations, or erasures. Sometimes the document may be rendered utterly ineffective by alterations in important parts. The most essential element is the sum, and the effect of any vitiation on this part will be further considered. In the mean time it may be observed that defects not sufficient utterly to invalidate the document may yet interrupt the summary method of execution applicable to bills.

It seems to be held that an erasure or alteration, if not in material parts—such as the sum, or the parties, will only interrupt summary diligence, until there be an inquiry whether the alteration was made with the consent of parties.[5]

[1] Th. 85.—[2] 8 & 9 Vict. c. 38, § 15.—[3] Bayley, 6.—[4] Ch. 132.—[5] Armstrong *v.* Wilson, 2d June 1842.

The following are the ordinary forms of bills and notes. It has to be observed that, in the bills the letters A B represent the signature of the drawer, those below them, viz. C D, that of the acceptor, whose address is at the other end of the document. In the note the letters C D represent the signature of the maker.

Form of an Ordinary Bill.

£150

Edinburgh, Nov. 20, 1839.

Three months after date,* pay to me or order,† at the Banking House of The British Linen Company in Edinburgh, the sum of one hundred and fifty pounds sterling, value received.

To Mr C. D. merchant, A B
No. High Street, Edinburgh. C D

* Or, so long after sight, or at sight, or on demand, or on such a day of such a month, as the case may be.
† Or, to X Y, or order, or to bearer.

Form of a Bill on France.

Exchange for 10,000 Livres Tournoises.

Edinburgh, Nov. 20, 1839.

At two usances,* pay this my first bill of exchange (second and third of the same tenor and date not being paid), to Messrs X Y or order,† Ten thousand livres tournoises, value received of them; and place the same to account as per advice‡ from

A Monsieur C D A B
Rue de —— Paris. C D

* Or, so long after sight, or so long after date, or on demand.
† Or, to bearer.
‡ Or, with or without farther advice.

Form of a Promissory Note.

£150

Edinburgh, Nov. 20, 1838.

Three months after date I promise to pay to A B or order £150 sterling, for value received. C D

*** The same variations which are applicable to bills of exchange apply.

SECT 3.—*Statutory Restrictions.*

Certain restrictions, in conformity with rules of old standing in England, have lately been introduced, chiefly with the view of regulating the currency, and preventing unauthorized parties from circulating documents capable of serving as Bank Notes. All bank notes, entitled to the privileges of that class of documents, must be expressed in pounds sterling, and not in guineas or any other denomination expressive of fractional parts of a pound.[1] Promissory notes, bills, or drafts, made in a shape in which they may be negotiated or transferred, and bearing to be for a less sum than twenty shillings, either in money, or in stated value of goods, are null, and cannot be enforced against any one. Any person connected with the uttering or circulating of such documents, is liable for each offence to a penalty of not more than £20, or less than £5, at the discretion of the Justice by whom he is tried.[2] All such negotiable documents, when for a sum exceeding £1, but less than £5, not issued by banks under the banking privileges, must be drawn and negotiated in a peculiar form, viz., They must contain the name and address of the person to whom or whose order they are payable; they must bear date at or before, and not subsequent to the time of drawing or issuing; they must be payable within twenty-one days after date, and must not be transferable or negotiable after that period; every Indorsement must be before the expiration of that term, must bear date at or not before the time of making, and must contain the name and address of the Indorsee; the signing of each bill or note and each indorsement must be attested by a subscribing witness. Documents made or indorsed in contravention of these rules are null.[3] Persons not acting under the banking privileges, who issue notes payable to bearer on demand for sums less than £5,[4] or who utter or negotiate negotiable documents of £1 and under £5, are liable to a penalty of £20 for each offence.[5] These rules are not to interfere with drafts on bankers.[6]

By the act for the regulation of railways, it was declared that certain railway companies had *bonâ fide* issued Loan Notes which were illegal and invalid. On this preamble existing loan notes were validated, but the issue of such documents in future was prohibited under penalties.[7]

[1] 8 & 9 Vict. c. 38, § 5.—[2] Ibid. § 16.—[3] Ibid. § 17.—[4] Ibid. § 18.—[5] Ibid. §§ 18, 19.—[6] Ibid. § 20.—[7] 7 & 8 Vict. c. 85, §§ 19, 20.

By the Joint Stock Bankers' Act, it is provided that the notes and bills of the banks to which it applies,* in the making or indorsing, must be signed by some Manager or Director, and be expressed by him to be signed on the part of the company.[1]

SECT. 4.—*Stamp.*

There are two scales of stamp duty applicable to bills and notes, according as they are made payable at what is technically termed "short date," or "long date." The former includes bills payable on demand or at any period not exceeding two months after date, or sixty days after sight; the latter includes those payable after a period of time longer than any of these periods.[2] The rule is strictly interpreted. Thus, a promissory note payable two months after sight, the two months happening to contain more days than sixty, was held liable to the larger stamp.[3] Foreign bills, viz. those drawn in Great Britian and payable abroad, when drawn singly are liable to the same stamp duty with inland bills; when drawn in sets a separate scale applies, according to which each "part" or copy must be stamped.[4] Bills drawn in the colonies must be stamped if the law of the place require it; as to bills drawn in other places abroad, it seems to be held that the law does not take cognizance of the revenue regulations of foreign countries.[5] It will not protect a bill from the stamp law of this country that it bears to be made abroad, if it can be proved to have been made in Britain.[6]

A bill cannot, like some other legal documents, be stamped after it is completed. But if a stamp of the proper or of a greater amount, though intended for a different species of document, be used, it will be sufficient, unless it bear on its face that it is so intended, as by the words "receipt stamp."[7] It is presumed, however, that in such a case the commissioners are empowered to apply the proper stamp, on payment of the stamp duty, and a penalty of 40s. if the stamp is affixed before the term of payment, or if otherwise, of £10.[8] The parties in a bill not duly stamped are liable to a penalty of £50.[9] Making or issuing a bill or note postdated, for the purpose of making it appear such a document

---

* See above, p. 194.—[1] 7 & 8 Vict. c. 113, § 22. 9 & 10 Vict. c. 75.—[2] 55 Geo. III. c. 184, Schedule.—[3] Bayley, 98.—[4] 55 Geo. III. c. 184, Schedule.—[5] Ch. on St. 14.—[6] Th. 30.—[7] 55 Geo. III. c. 184, § 10.—[8] 37 Geo. III. c. 136, §§ 5, 6.—[9] 55 Geo. III. c. 184, § 11.

as would require only the short date stamp, whereas it requires the long, involves a penalty of £100.[1] An unstamped bill is totally useless for the purposes of a bill; and although it may serve as evidence for other purposes (such as a criminal prosecution for forgery), it cannot be evidence of a debt.[2] Though the bill, however, is null, the debt (if any) on which it may have been founded may exist and be otherwise proved. If no obligation to pay has been incurred by any one, the document does not come within the act; and it has been decided "that a mere request by one party to another, on whom he has no claim, to pay a certain sum to a third party, and place it to his account, is not liable to stamp duty as a bill; and the same decision has been given regarding a request to pay a certain party the balance due to him for building a chapel, for which their receipt is said to be a sufficient discharge."[3*]

Evasion.—If a document is really intended for the purposes of a bill or note, it will not be saved from the effect of the stamp laws by being worded in a different manner from ordinary bills or notes. Thus, a document acknowledging receipt of £80, and promising to pay the same when required, was held to be a promissory note, and action was refused on it as it was unstamped;[4] and so of a document which bore, "We acknowledge to have borrowed and received from you £100, which we will repay you at the term."[5] Where a somewhat similar document specified that there was no stamp at hand, and obliged the granter to give a stamped bill when called for, the same was held.[6]

Specialties as to Bills.—The following documents are specially ranked as bills requiring to be stamped. Orders for the payment of money by a bill or note, or for the delivery of a bill or note in payment or satisfaction of money, when the order requires the payment or delivery to be made to the bearer or to order, or when it is delivered to the payee or to some one for his behoof. Bankers' receipts for money received, which may entitle or are intended to entitle the person paying the money, or the bearer, to receive the like sum from any other person. Orders to pay money out of any particular fund which may or may not be available,

---

[1] 55 Geo. III. c. 184, § 12.—[2] 31 Geo. III. c. 25, § 19.—[3] Th. 28.—[*] See this general subject further discussed in the section applicable to the general operation of the Stamp Laws, p. 141.—[4] Alexander v. Alexander, 26th February 1830.—[5] Haddin v. M'Ewan, 17th January 1838.—[6] Mackintosh v. Stewart, 13th May 1830.

or on a condition or contingency, when made payable to the bearer or to order, or delivered to the payee or to some one for his behoof.[1] In a late case an order of payment out of a particular fund that might or might not be available, was found liable to a stamp.[2] There are statutory exemptions from stamp, including generally bills or bank post bills of the Bank of England, bills drawn on persons in certain public employments, and for facilitating the payment of the naval and military forces,—always provided the transactions be strictly gone through according to the statute, and bills for a less sum than 40s.[3]

Drafts on bankers are exempt, provided they be drawn within fifteen miles of the banking office, state the place where they are drawn, bear date on the day of issue, or the day before, and do not direct payment to be made in bills or notes.[4] A draft in which the person to whom the money is payable is stated, as "pay to James Martin," is not within the exemption. It would appear, however, that if the name be followed by the word "or bearer," the draft is exempt, and it is decided that a memorandum of the payee's name in a corner does not subject the document to stamp.[5] If a draft be post-dated, or otherwise deviate from the conditions of the exemption, and be not stamped, the maker is liable to a penalty of £100, the receiver to a penalty of £20, while a banker paying the draft in the knowledge of the circumstances forfeits £100, and is not allowed to debit the payment.[6] A cautioner on a cash credit was found not liable for drafts drawn beyond the statutory distance, or wrong dated in time and place and known by the bank agent to be so.[7] It may be inferred from this case, that when drafts correspond, on their face, with the statutory requisites, and there is no reason on the part of the bank for suspecting a divergence, they are to be held legal drafts so far as the bank is concerned.

Specialties as to Notes.—Promissory notes are distinguished by the stamp act into four classes:—1*st*, Notes payable to the bearer on demand, and for a sum not exceeding £100. These may be re-issued without additional duty after having been paid, provided the person or banking company using the privilege take out an annual license for so doing,

---

[1] 55 Geo. III. c. 184, Schedule.—[2] Taylor *v.* Hutchison, 13th February 1845.—[3] 55 Geo. III. c. 184, Schedule.—[4] Ibid. and 9 Geo. IV. c. 49, § 15.—[5] Swan *v.* Bank of Scotland, 8th December 1841.—[6] 55 Geo. III. c. 184, § 13. Swan *v.* Bank of Scotland. App. 6th July 1835, 2 S. & M'L. 67.—[7] Swan *v.* Bank of Scotland, 21st November 1839.

under a penalty of £100. If a banking house has two, three, or four places of issue in Scotland, it requires a license for each; but four licenses will suffice for any number of places of issue.[1] The date must not be *printed* on such notes under a penalty of £50.[2] 2*d*, Notes for any sum not exceeding £100 payable otherwise than to bearer on demand, but at a term not exceeding two months after date, or sixty days after sight. 3*d*, Notes for any sum exceeding £100, payable to bearer on demand, or in any other manner, at a term not exceeding two months after date, or sixty days after sight. 4*th*, Notes payable to the bearer, or otherwise, amounting to 40s. or upwards, at a term exceeding two months after date, or sixty days after sight. All these have respective scales of duties adapted to them.[3] None but the first sort can be re-issued after being paid. The exemptions from stamp are, 1*st*, Notes payable out of any fund which may or may not be available, or on an uncertain contingency, not payable "to the bearer or to order," unless where the sum amounts to £20 or upwards, or is indefinite.[4] 2*d*, Notes which are in reality agreements, though in the form of promissory notes,[5] they being liable to an agreement stamp. 3*d*, Notes for less than 40s. not payable to bearer on demand. Promissory notes to bearer on demand made, or purporting to be made, out of Great Britain (except those made and payable in Ireland), must not be negotiated in Britain, under penalty of £20 against every party to the negotiation.[6] The Bank of England, in respect of a composition, is entitled to issue all its notes unstamped. The Bank of Scotland, the Royal Bank of Scotland, and the British Linen Company, in consideration of certain duties, have exemption for their notes of one pound, and two pounds.

SECT. 5.—*Sum.*

The sum is generally marked in figures on the upper left hand margin; but it is a legal requisite that it should be in words in the body of the bill. The latter founds the obligation, the former can only make it more clear, and so if they differ the latter is the rule.[8] The sum must be a distinct named sum, and in money, not in other property, even though it may be immediately convertible into money, as

---

[1] 55 Geo. III. c. 184, § 24-29.—[2] Ibid. § 18.—[3] 55 Geo. III. c. 184, Schedule. Promissory Note.—[4] Ibid.—[5] Ibid.—[6] Ibid. § 29.—[7] Ibid. § 21-23.—[8] Th. 69.

East India bonds, bank notes, &c. It must not be in money *or* other property.[1] A note for £65, with interest, and all other sums that may be due to the payee, was not sustained, even as a note for the £65.[2]

Blanks and Alterations.—If a person sign a blank bill stamp, or a bill with the sum blank, he is liable for any sum afterwards filled in which the stamp will cover, having recourse against any person who may have committed a fraud on him in the filling up.[3] In the same manner one who leaves a blank which may be the means of altering the sum in the bill is liable for the altered sum. If a claim is made by the person who has committed the fraud, it may be resisted on the ground of the fraud (*see below*, p. 330), while the bill is good to the altered amount in the hands of a holder ignorant of the fraud who has given value; but if the alteration is so apparent that ordinary scrutiny ought to have enabled any one to discover it, it will nullify the bill.[4] Two bills had been altered; in one the original sum being "fifty-eight pounds," the words "four hundred and" were prefixed, there having been a blank owing to the stamp not being written upon, so that the bill had just the appearance of being a bill for £458. Another bill for £50 was changed in a similar manner to a bill for £450; but the word "four" had a crowded appearance. The court held the former good to its full extent to an onerous holder, while the latter was held to be bad.[5] It was remarked, that if the consequence of fraud must fall on an innocent party, it should be on him whose carelessness occasioned it. In the former instance it fell on him who had signed a bill where there was room carelessly left for the alteration; in the latter on the person who took it where the alteration was discoverable by due attention. Suspension was refused on a bill which was said to have been accepted blank on the body, but with the sum £100 17s. stated in figures on the margin, which was said to have been altered to £199 17s., there being no apparent irregularity or vitiation.[6]

SECT. 5.*—*Conditions.*

The sum must be payable absolutely, and not on a condition, nor can it be clogged by a condition to be performed along with it.[7] But if there be really no definite condition,

---

[1] Bayley, 11. Imeson, August 1815, 2 Rose, 225.—[2] Smith *v.* Nichtingale, 1818, 2 Stark, 375.—[3] Th. 70. Lyon *v.* Butter, 7th December 1841.—[4] Ibid.—[5] Grahame *v.* Gillespie & Co. 27th January 1795, M. 1453.—[6] Moodie *v.* Brown, 22d June 1839.—[7] Th. 9.

although one be apparently expressed, the bill will be good. Thus, where the sum was followed by the words "with penalty conform to law," the bill was held good, because by law there was no penalty.[1] Had a specific penalty been named, the bill would have been bad. It has been admitted in England that a clause of interest does not affect a bill,[2] and the rule holds in Scotland.[3] If what might appear to be a condition is merely explanatory, the bill is not vitiated. Thus, a bill being drawn by Lord Forfar on the agent for his regiment, desiring him to pay £111 "out of the first subsistence you receive from me," with these words added, "which (sum) shall become due eight months after date," the bill was held good because the latter sentence made the mandate imperative as to the time of payment, while the former only pointed out the fund from which it was to be paid.[4] "An order *by the freighter* of a ship to pay money *on account of freight*, or an order to pay so much as *the drawer's quarter's half-pay by advance*, or *for value deposited and registered*, or I promise to pay M. A. on demand £ *by given up clothes and papers*, or *when J. S. comes of age, to wit, June* 12, 1750, or *six weeks after the death of A. B.*, have been held payable at all events, and therefore good; for, to use the words of Willes, C. J., 'If a bill or note be made payable at ever so distant a day, yet if it be a day that must come, it is no objection to the bill or note;' and therefore a note payable *within two months after his Majesty's ship A. B. shall be paid off*, is good, for the paymaster being government, it is morally certain that payment will be made."[5]

SECT. 6.—*Date.*

It is said that "in Scotland the date is an indispensable requisite; and bills without a date are null, if they have not all the solemnities required to other obligations."[6] In England the rule appears to be, that action may be maintained on an undated bill, that the day of making it will be presumed to be the date, "and if that cannot be ascertained, then the first day it can be proved to have existed."[7] Nor does it appear that in Scotland it is necessary that the date should be expressed, provided the document is not conceived in the terms of a permanent or perpetual security; and so a bill payable on a day named is good without a date.[8] Paper

[1] M'Niel *v.* Campbell, 24th January 1741, M. 1422.—[2] Cameron *v.* Smith, 1819, 2 Barn. & Ald. 305.—[3] Th. 14.—[4] M'Dowal *v.* Duke of Douglas, June 1731, M. 1541.—[5] Smith's M. L. 188.—[6] Glen on Bills, 68. E. iii. 2. 26.—[7] Ch. on B. 563.—[8] Iv. Er. 623.

made payable at a certain length of time after sight, must however be specially dated.[1] The drawer of a bill, by leaving a blank for the date, is held to have authorized the holder to fill up whatever date covered by the stamp he chooses, and the bill will be effectual, at least to an onerous holder, ignorant of any fraud that may have been committed in the dating.[2] (*See below*, p. 330.) Thus, where a partner of a company drew a bill blank in date, and blank indorsed it under the company's firm, and the clerk of the company had, after the death of this partner, filled up the blank, an onerous holder's right against the surviving partners was held good.[3]

Although the more regular course of transacting a bill of exchange is, for the drawer to sign in the first place, and the acceptor afterwards, a bill regularly signed by both drawer and acceptor leaves no room for inquiry as to the order of signing. One who accepts blank, indeed, leaves room for any drawer who may, without fraud, assume that position; and an accepted bill, without a drawer at all, is a good document of debt in the hands of a person properly acquiring it; though, as there is no creditor's name on the face of it, it will not authorize summary diligence.[4]

SECT. 7.—*Subscription.*

It is a general rule that to found an obligation on a bill or note, it is necessary that the person bound should have adhibited his subscription. It is supposed that subscription is not necessary for a note under £100 Scots;[5] but, by special statute, there can be no acceptance of an inland bill, except by writing on the bill; while, by the act cited above, all negotiable bills or notes for sums of 20s. and less than £5 must be subscribed in a peculiar manner.*[6] It is said that the name of a *drawer* occurring in the body of the bill, in his own handwriting, will bind him, though not to the extent of admitting summary diligence.[7] (*See below*, p. 334.) The same rule would naturally apply to the maker of a note. Acceptance, however, is not presumed from the drawee of a bill addressing it to himself.[8] In England it appears still to be law as to foreign bills—as it was formerly as to inland—that acceptance may be proved otherwise than by writing on the bill.[9] In Scotland (unless the above-mentioned instance be an exception) no bill can be constituted

[1] Th. 61.—[2] Ibid.—[3] Usher *v.* Dauncey, 1814, 4 Camp. 97.—[4] Th. 55, *et seq.* Iv. Er. 624. n.—[5] Th. 43.—* See above, p. 307.—[6] 1 & 2 Geo. IV. c. 78, § 2.—[7] Th. 43.—[8] Ibid.—[9] 1 & 2 Geo. IV. c. 78, § 2. Ch. on B. 268.

without the signature of the acceptor, or what is received as an equivalent, appearing on its face. Any claim which a party would have from another having promised to accept, or having allowed it to be understood that he would accept, would constitute a ground for damages. Thus, where the factor of a West India proprietor had applied to the consignees of the produce of the estate to accept an accommodation bill (*see* p. 327) for the use of the proprietor, and the consignees had promised by a separate writing to do so, and a third party had advanced money on the faith of the writing, the proprietor having died in the mean time, and the consignees who were involved in his affairs having refused to accept, they were held liable to compensate the third party.[1]

Where a Party cannot write, it is understood that the ceremony of signing by notary-public may be substituted for subscription; but the law has not clearly pointed out the extent of the solemnity. It is presumed, however, that subscription by one notary before two witnesses is sufficient, and it would be practically prudent to make the witnesses subscribe, and to describe them.[2] (*See above*, p. 136.) Where a party is in the habit of signing merely by initials, and cannot sign otherwise, it appears that a bill so signed would have the privileges and be bound by the laws of bills, with the exception of the privilege of summary diligence; but if the party do not acknowledge this subscription, it will be necessary that it be otherwise proved, and that it be shown that such is his usual mode of subscribing.[3] The law with regard to the adhibiting of a mark is in an equally doubtful state, and it would appear that such a method of expressing consent, even if attested by witnesses, would require to be supported by proof that it was intended to stand in place of the party's signature, and was his usual substitute for it. It will not justify summary diligence.[4]

SECT. 8.—*Procuration.*

A person may become a party to bills or notes by the subscription of another. This may take place by Procuration founded on a special mandate, or presumed from a train of circumstances or from the relative position of the parties. The procuration may exist only to the extent of a single

[1] Shepherd v. Campbells, &c., 28th May 1823.—[2] Th. 45.—[3] Ibid. 47.—[4] Ibid. 49. Iv. Er. 622.

document, or may embrace a course of transactions. In England a simple verbal mandate, when duly proved, is held to constitute a procuration;[1] in Scotland this doctrine is questioned.[2] Where a person has sanctioned his clerk or manager in drawing and accepting for him, a general procuration is held to exist to the extent of all transactions of a like nature.[3] It has been held that the usage of a particular trade may constitute an authority for a commission agent drawing and indorsing by procuration, without any special mandate.[4] An individual transaction may be legalized as well by subsequent approbation as by previous authority.[5]

A general commission of factory will enable the holder to conduct bill transactions for his constituent, unless he be specially limited. The commission may exclude bill transactions expressly, or by implication from the general nature of the authority which it confers, or from its specially enumerating other powers, and omitting authority to sign bills. An authority to collect, discharge, and compound debts, has been in England held not to authorize the negotiation of bills received in payment.[6] In England, where one went abroad, leaving a power of attorney which with ample special powers gave authority to do "all and singular such further and other acts, deeds, matters, and things, as should be requisite, and expedient, and advisable to be done," with special power "to indorse, negotiate, and discount, or acquit and discharge the negotiable securities which were or shoulud be payable to him, and should need and require his indorsement," this was held insufficient to authorize the mandatory to raise money by acceptance.[7] It was formerly held that the recall of the authority invalidated every act done by the mandatory after the revocation.[8] The doctrine in England, however, has long been, that whoever has transacted business with the mandatory as such, is entitled to consider his authority as still existing, until he have reason for supposing the contrary,[9] and the same appears to be now held in Scotland.[10] Death or bankruptcy terminates procurations, and is presumed to give general warning of the termination; but even here time must be allowed for the news to have reached the proper quarter, ere third parties will be affected.[11]

Whoever signs by procuratory should let it appear on the face of the bill that he acts in that capacity by the words

---

[1] Ch. on B. 30.—[2] Th. 220.—[3] Ibid. 221.—[4] Anderson *v.* Buck, 3d June 1841.—[5] Th. 222.—[6] Paley on P. & A. 192.—[7] Attwood *v.* Munnings, 1827; 7 Barn. & Cres. 278.—[8] B. C. i. 400.—[9] Paley on P. & A. 170.—[10] Th. 225.—[11] Ibid.

"for" such a one, or, "per procuration for," &c., otherwise he will be personally liable.[1] It has been so found in England in the case of the clerk or agent of a bank, and of a cashier of a public company.[2] The partners of a company are, as respects the public, procurators of the company to the extent of binding the firm. (*See above*, p. 181.)

CHAPTER II.

RIGHTS, DUTIES, AND LIABILITIES OF PARTIES.

SECT. 1.—*Presentment.*

THE presentment of a bill to the person on whom it is drawn, is made, for acceptance, for payment, or for both at the same time. When a bill is made payable within a specified time after sight or after demand, it is absolutely necessary, in order to fix the period when it is to be paid, to present it to the drawee for acceptance.[3] In this case, if there is acceptance, the bill when due will be presented again for payment.

Presentment for Acceptance in the first instance is not necessary when the bill is drawn at a day certain, at sight, or on demand, for it may be finally presented for acceptance and payment.[4] Presentment for acceptance is, however, in all cases prudent, as it furnishes a new party to the bill on acceptance, or on dishonour gives the holder immediate recourse; an agent holding a bill will be responsible for the solvency of the drawer if he do not present it for acceptance.[5] In the cases where presentment for acceptance is required, neglect to present within a reasonable time will destroy the holder's recourse on the drawer, &c., but what is a reasonable time seems not to be farther decided than by making it referable to custom.[6] In England it is held that foreign bills payable after sight may be kept to an unlimited period, being regarded as general letters of credit.[7] Meanwhile, and before

---

[1] Bayley, 69.—[2] Leadbitter *v.* Farrow, 1816, 5 M. & S. 345. Thomas *v.* Bishop, Str. 955.—[3] Ch. on B. 272.—[4] Ibid. Th. 409.—[5] Dunlop *v.* Hamilton, 16th January 1810.—[6] Bayley, 227. Th. 411.—[7] Johnson on Bills, 27.

acceptance, the document may be circulated by indorsation (*see below*, p. 324), so as to render the payee, if he shall accept, liable in the first instance to the holder or indorsee, the drawer and each indorser being liable for the debt if the bill is not accepted. In the general case, if acceptance is once refused, presentment need not be made for payment, the drawer becoming immediately liable.[1]

By the custom of merchants, the drawee is allowed twenty-four hours to make up his mind whether he shall accept or not; but it is said, that if a post, by which notice of dishonour may be sent, leave in the mean time, he must decide in time to admit of notice being sent.[2]

Presentment for Payment must be made before expiry of the last day of payment, and at proper business hours. If particular hours be fixed by the usage of the place, they must be observed. Presentment at a bank-office will not be good unless it be made during bank hours.[3] But presentment cannot be considered unreasonable, whatever be the hour, if there be a person at the place who refuses to pay.[4] In the general case the question whether the time is within business hours goes to a jury.[5] The proper place of presentment is generally to be discovered by the address. In presentment for payment, if a place, such as a bank-office, be named on the bill, the presentment to secure recourse against the drawer and indorsers must be made there.[6] In as far as respects the acceptor's obligation, however, though there be a place named, unless the words "only," or "and not otherwise," or "and not elsewhere," be written after it, the acceptance is general, and presentment to the acceptor, wherever he may be, cannot be wrong.[7] Where a bill drawn payable at a place not the residence of the drawee is refused acceptance, presentment for payment must be made at the place of payment.[8]

When a Bill is Accepted for Honour (*see below*, p. 322), or there is a reference in case of need, it need not be presented to the acceptor or referee until the day after the day of payment, and if the acceptor or referee be not in the place of payment, it need not be transmitted till such day after.[9] If that day be a Sunday or a holiday, the day next following will be sufficient.[10]

---

[1] Ch. on B. 349.—[2] Th. 432.—[3] Ibid. 437.—[4] Bayley, 226.—[5] Neilson *v.* Leighton, 7th February 1843.—[6] Th. 323.—[7] 1 & 2 Geo. IV. c. 78, § 1.—[8] 2 & 3 Wm. IV. c. 98.—[9] 6 & 7 Wm. IV. c. 58, § 1.—[10] Ibid. § 2.

SECT. 2.—*Payment and Days of Grace.*

The proper times and places at which payment may be demanded are to a certain extent explained above under the head of Presentment. The acceptor of a bill or maker of a note cannot, under any circumstances, be bound to pay it, nor can the holder be bound to accept payment, before the day on which it falls due.[1] Where the holder of the paper is not named in it as payee or indorsee, there is risk in paying it before it becomes due, as he may turn out to have obtained it wrongfully. It is said, that where the holder's name does appear on the bill, such payment may be made in safety;[2] but it may still be questioned what would be the result if the holder had blank indorsed it, and fraudulently recovered it.

Certain days called "days of grace" are allowed to run on bills payable on a day named, or on a day so long "after date," or "after sight." They vary in different countries. In Britain they amount to three, unless the last day would fall on a Sunday, or a holiday on which business is prohibited by public authority.[3] The days of grace begin to run from the termination of the nominal day of payment, and the last of them is the real day of payment. Thus, if a bill, dated 1st January, be made payable three months after date, the day of payment will be the 4th April, or if that day be Sunday or a holiday, the 3d. Calendar not lunar months are the rule where the mere word "months" occurs, and the nominal day of payment is not carried into a succeeding month. Thus, if a bill at three months be dated 30th November, the days of grace will begin to run from the termination of the 28th day of February. It has not been decided in Scotland whether bills at sight carry days of grace.[4] In England they do not.[5]

The payment must be in money, or what the holder may choose to receive as an equivalent. If bills, bank notes, or a check be offered, the holder will take them at his own risk,—that of losing recourse on the drawer or indorsers of the original bill if they prove bad.[6]

SECT. 3.—*Noting and Protest.*

If on presentment for acceptance or payment, as above, the

---

[1] Th. 376.—[2] Ibid.—[3] Bayley, 245.—[4] Th. 378.—[5] Johnson on Bills, 9.—[6] Th. 388. Johnson, 50.

bill be not duly accepted or paid, the first duty of the holder is to get it noted, as a means of taking protest if necessary. This is done by a notary-public, who must not be a party to the bill.[1] The bill should be presented a second time in presence of two witnesses by the notary, who then marks the bill with his initials, the date, and his charge.[2] It is not clearly ascertained whether the notary can perform this initial ceremony by deputy. In London and Liverpool it is the practice for the notaries' clerks to make the presentment in the case of foreign bills, which are the only kind usually protested in England; but the practice has been disapproved of by the best authorities.[3]

This process is the foundation on which the notary draws an Instrument of Protest, which must be on stamped paper, and must contain a verbatim copy of the bill or note with all its indorsements, and the circumstances under which it was presented, with the names of the witnesses.[4] Noting and protest are the foundations of summary diligence against any of the parties, and they are absolutely necessary for recourse against the drawer and indorsers.[5] To secure summary diligence (*see below*, p. 335), a protest for non-acceptance must be registered within six months after the date of the bill; a protest for non-payment within six months after the day of payment.[6] After considerable doubts, it has been lately decided that by the construction of the acts, protest on a promissory note payable on demand does not require to be registered within six months after its *date*, but may be duly reg stered within six months after the *demand*.[7]

SECT. 4.—*Notice of Dishonour.*

If the holder of a bill wishes to retain recourse against the drawer and indorsers, on non-acceptance, on acceptance merely conditional, or non-payment, he must send them timely notice.

In Inland Bills, it is fixed by statute that it is sufficient if the notice be sent within fourteen days.[8] Whether the notice must be received within the period, or it be sufficient that it be despatched within it, seems doubtful;[9] the practice is to send notice immediately. It is to be observed, that it is only in the hands of the holder that the period of

[1] Th. 444.—[2] Ibid. 446.—[3] Ch. on B. 458, *et seq.*—[4] Th. 448.—[5] Ibid. 442-448.—[6] 1681, c. 20. 1696, c. 36. 12 Geo. III. c. 72, § 42. 23 Geo. III. c. 18, § 55.—[7] Bon *v.* Rollo, 21st February 1846.—[8] 12 Geo. III. c. 72, § 41.—[9] B. C. i. 419.

sending notice may be thus protracted; if one indorser is to have recourse on another, the notice which he gives, after receiving notice himself, is subject to the same rules against delay, which will be explained, as applicable to foreign bills.[1]

Foreign Bills.—The above act not extending to foreign bills is held not to include those between England and Scotland, *i. e.* those drawn in the one country and accepted and made payable in the other.[2] In these the general custom of merchants requires that notice should be sent "without undue delay." Notice *may* be sent immediately on refusal to accept or pay.[3] If there is no refusal the rules as to presentment must be observed as above. If the parties reside in the same place (which in general can only be the case when one is an indorser), notice should be given before expiry of the day following the dishonour.[4] Where they reside in different places, it would seem that notice ought to be despatched by the earliest post which leaves the place, after the dishonour.[5] Each party has a day for giving notice,—that is, having received notice himself, if he mean to have recourse on a previous party, he sends that party notice on the day following.[6]

A Sunday, a public holiday, or a day which his religion enjoins to be kept holy, will not be counted against a party bound to give notice.[7] The notice may be verbal or written;[8] in practice it is always written. It ought to import that the bill has been dishonoured, and that the party giving notice looks to being indemnified by the party to whom it is given.[9] Where a person is extraneously involved in the security of a bill, as by guaranteeing it, it seems not to be decided how far he is entitled to immediate notice; that his responsibility ceases, however, if the dishonour be long concealed from him, and real injury thereby occasioned, has been admitted.[10]

The giving of notice is a mere personal duty on the part of the holder, to enable the party becoming liable to attend to his own interest, but it is not an essential requisite, and the want of it may be excused from inability to perform it—as, the illness of the holder, or the death of the person employed to give notice, &c.[11] If it can be shown that the drawee had no funds of the drawer in his hands, and that the drawer could not expect him to have any, the want of notice will not save the drawer from recourse.[12] It is on any

[1] Th. 503.—[2] Ibid. 491.—[3] Bayley, 267.—[4] Ibid. 268.—[5] Ibid.—[6] Ibid.—[7] Th. 490.—[8] Bayley, 276.—[9] Ibid. 256.—[10] See Borthwick *v.* Robertson, 3d June 1830, Bayley, 287.—[11] Th. 511.—[12] Ibid.

occasion, however, dangerous to omit notice; and in England it is held, that if the drawee has had effects in his hands, though insufficient to meet the bill, and though the drawer was warned of the insufficiency, he is entitled to notice.[1] It would appear that an acknowledgment of liability by the party may preclude him from pleading the want of notice. So it was decided where the drawer had written a letter, requesting indulgence and promising to settle the bill, although he pleaded that when the letter was written he was ignorant of the effect of no notice in his favour.[2] Neglect of notice only affects him who has neglected; it will not interfere with the right of an onerous holder, as in the case of a bill at so many days after sight, of which acceptance is refused, being circulated before presentment for payment.[3] At the same time the advantage of notice given by the holder accrues to all the intermediate parties.[4] His neglect to give notice, however, will not exonerate them, while notice given by them will be available to him.[5] Thus, if A draw and indorse to B, and B indorse to C, if the bill be dishonoured in C's hands, and he give notice to B and to A both, his notice to A will enable B to have recourse on A if he pay the bill. If C only give notice to B however, then to give B recourse on A he must give notice to A, and on this notice, if C should not recover against B, he may against A. It appears to be considered that notice of non-payment by an acceptor will be sufficient to save the holder's recourse.[6] Presentment, protest, and notice, when duly performed, are termed due negotiation, and their effect is to render the drawer and indorser immediately liable for the sum contained in the bill, with the expenses incurred. The liability does not, properly speaking, commence until the demand is made, but when made, it must be complied with without delay.[7]

An acceptor is not entitled to notice; and so it was found that a co-acceptor who had given his name for the accommodation of the other who was the original debtor, was not relieved by not having received notice that that other had failed to pay. In the same case it was decided that the acceptor of a blank bill-stamp is not entitled to notice of the sum filled up in it.[8]

SECT. 5.—*Acceptance, &c., for Honour.*

When the party on whom a bill is drawn fails duly to ac-

[1] Bayley, 300. See Ch. on B. 436.—[2] Turnbull *v.* Hill, 16th Feb. 1831. —[3] Bayley, 252.—[4] Th. 497.—[5] Ibid.—[6] Ibid. 499.—[7] Ibid. 531.—[8] Lyon *v.* Butter, 7th December 1841.

cept or pay it, the obligation may be undertaken by a third party for the honour of the drawer or of an indorser. The drawee too, if he decline to acknowledge the obligation to the drawer involved in his acceptance, or to pay the contents to the holder on his own account, may still choose to accept or pay for the honour of the drawer, preserving recourse against him. This is termed acceptance or payment for honour, or *supra* protest.[1] Before acceptance for honour, the bill must be protested for non-acceptance. The acceptance itself must be made in the presence of a notary and two witnesses, and narrated in an instrument.[2] Intimation of such acceptance must be made, and the instrument of protest must be transmitted to the individual for whose honour it is made, to preserve the acceptor's recourse against him.[3]

It is maintained, that as the holder of a bill has an absolute mandate to a particular party, he cannot be compelled to take acceptance on protest from the drawee or any other person, but should have an absolute acceptance from the drawee.[4] If he take a qualified acceptance, he loses recourse against the drawer, unless he protest for want of absolute acceptance and give notice.[5] Two or more persons may accept, each or all for the honour of one or more parties.[6] A general acceptance on protest is presumed to be for honour of the drawer.[7]

The acceptor *supra* protest becomes absolutely liable to the holder notwithstanding his protest, which is only to preserve his recourse against the person for whose honour he has accepted, but he is only liable after the drawee, against whom the bill must be protested for *non-payment* before *he* can be liable.[8] He has then relief against the person for whose honour he has accepted, and failing him against those persons who would be liable to *him*, provided they have had notice of the acceptance on protest, either from the drawer or acceptor.[9] But the acceptor for honour of a primary obligant in a bill has no recourse against a person rendering himself subsidiarily liable to the holder; so if one accept for honour of the drawer, he can have no recourse against an indorser.[10]

When a bill is paid *supra* protest without having been so accepted, there must be a notarial instrument, as in the case of acceptance.[11] An unconditional acceptor, if he have no

---

[1] Bayley, 176, *et seq.* Th. 457, *et seq.*—[2] Th. 460.—[3] Ibid. 473.—[4] Ch. on B. 287, 300, 345. See Glen on Bills, 130.—[5] Th. 459.—[6] Ibid.—[7] Ch. on B. 346.—[8] Th. 461.—[9] Ibid. 462.—[10] Ch. 352.—[11] Th. 464.

funds of the drawer in his hands, may pay *supra* protest for honour of the drawer, not for that of the indorsers, for by the acceptance he is unconditionally bound to them.[1] It is held that in the general case, when a person "pays a bill to the holder to which he is no party, and is put in right of the bill, he comes in the place of the holder to the effect of being entitled to claim against all the obligants in the bill, in the same manner as the holder could have done, although he may have been induced to interfere on account, or at the request of a party to the bill, who could either have only claimed against some of the obligants, or, as being the primary debtor, could not have claimed against any of them."[2]

SECT. 6.—*Transference by Delivery and Indorsation.*

Where there is a named payee, the transference of bills or notes is accomplished by indorsation; where the payee is not named but simply described as "bearer" or otherwise, the conveyance may be accomplished by mere delivery. In the former case, the person who parts with the bill becomes a party to it in the capacity of a new drawer, and so responsible to the holder; in the latter, he merely hands over the right as it stood in his own person, without incurring any responsibility as a party to the bill. Part of this subject has already been discussed. (*See above*, p. 304.) Delivery is necessary to constitute the transference in either case, and will be presumed from possession.[3] Where the indorsement mentions the indorsee's name it is a special indorsement,—where it is a mere signature it is called a blank indorsement. In the former case a new payee is created, and the bill can only be paid to him or to his indorsee; in the latter it is payable, like a bill which has never had a payee's name, to any bearer.[4] In many instances prudence will suggest the propriety of a full in preference to a blank indorsement, as a safeguard against the effect of the bill being lost or stolen. In England, to render a bill or note transferable by Indorsement, it must contain after the payee's name the words "to order" or some others, indicating that a new payee may be constituted.[5] A note drawn by a person residing in Edinburgh, in favour of a person residing in London, but not made payable in any express place, was held a Scottish note,

[1] Th. 463.—[2] Johnstone *v.* Inglis' Trustee, 19th July 1843.—[3] Th. 256.—[4] Ibid. 270.—[5] Smith's M. L. 172, 182.

and transferable by indorsement in England, without having any indorsable terms.[1]

A person indorsing a bill, of which he is not payee, may become responsible as a new drawer, but does not convey the bill.[2] The holder of a bill may limit its negotiability by a restrictive indorsement, as, "pay to A B only," or "pay to A B for my use," and such a bill cannot be re-indorsed;[3] but in the latter case, it would appear that a second indorsee may discount the bill, since the money drawn by him on discounting it will be held to have been received for his constituents' behoof.[4] If a bill should return to one of the indorsers of it, it becomes a negotiable instrument in his hands by the simple scoring out of the indorsations subsequent to his own, and he can hand it over as indorsed by himself to any third party.[5] A bill may be indorsed before acceptance, and even when it is blank in every thing but the drawer and indorser's name, or after being protested, and even after the protest is recorded, but to transfer the protest along with it there must be a separate assignment.[6] After being paid, bills or notes cease to be documents of debt; they are only receipts, and cannot be transferred.[7] This rule is subject to the exceptions stated under the head of stamps. (*See above*, p. 308.)

If a bill is null, it cannot be validated by indorsement, so as to give the holder, however onerous may have been the transaction by which he has obtained it, a right to recover payment. When the bill is only invalid in respect of the conduct of a party connected with it, and with reference to him, the right of an indorsee depends on onerosity and good faith. It has been a subject of much discussion whether a bill, by being indorsed after the period at which it is payable, subjects the indorsee to exceptions which may be pleaded against the indorser, such as want of value, fraud, &c. In England, that the bill has been so indorsed appears to be considered an article of evidence against the indorsee's having acquired it in good faith. "Therefore, if a bill or note, founded on a smuggling or stock-jobbing transaction, be indorsed after the same became due, to a person ignorant of the illegality, and for full value paid by him, he cannot recover."[8] It seems to be the principle of the law of Scotland, that receiving a bill after the term at which it was payable does not raise a presumption against the indorsee, and

[1] Robertson *v.* Burdekin, 14th November 1843.—[2] Th. 273.—[3] Bayley, 125.—[4] Th. 274.—[5] Adam *v.* Watson, 13th December 1827.—[6] Th. 264.—[7] Ibid. 265.—[8] Ch. on B. 218.

that his not being an onerous holder lies to be proved. Thus, in 1826, where action was brought on a bill indorsed five years after the term of payment, and alleged by the creditor to have been fraudulently indorsed, the court found that having no mark of dishonour about it, if the indorsee obtained it onerously, and without fraud, he was entitled to the contents, and that fraud or want of value could only be proved by his oath, observing, that as there was no mark of dishonour, "this bill continued to be a negotiable document till it was extinguished by the lapse of six years;"[1] but Mr Thomson holds that the presumption against such a document, "though not yet admitted in Scotland, appears to be well founded in principle."[2]

It is an effect of indorsation to assign or transfer the money of the drawer in the hands of the drawee, from the indorser to the indorsee;[3] and so, after the bill is accepted, even should an arrestment by the payee's creditors intervene between the acceptance and indorsation, the indorsee will have a preference if there be no collusion.[4] An arrestment in the hands of the acceptor is not invalid, so long as the debtor continues to be holder of the bill. It is therefore a measure of prudence on the part of the arresting creditor to apply to the court to take the bill into custody, and thus prevent its being indorsed until he succeed in a forthcoming.[5] (*See* Index, *Arrestment.*) Although an indorsee may be obliged to account with the indorser for the proceeds of an indorsed bill, it is decided that no arrestment in his hands by the indorser's creditors, of the bill or the contents of it, is available,[6] the indorsee not having property of the indorser in his hands, though he has a document which may afterwards *put* property of the indorser in his hands. *A condition* annexed to an indorsation, before acceptance, will bind any one accepting under it.[7] If the indorser annex to the indorsation the words "without recourse," no demand can be made on him in case of the other parties failing to pay;[8] in that case he gives their security merely, not his own. If there is no such reservation, the indorser incurs the responsibility of a new drawer, and on the refusal of the person drawn on to pay or accept, becomes immediately liable for the contents. But to render his right available, the indorsee must attend to the rules of negotiation, protest, and notice.

---

[1] M'Gowan *v.* M'Kellar, 24th February 1826. See also Young *v.* Pollock, 15th November 1831.—[2] Th. 307.—[3] Ibid. 289.—[4] Ibid. 290.—[5] Ibid. 295.—[6] Ibid. 291.—[7] Ch. on B. 234.—[8] Ibid. 235.

Bills and notes are frequently placed in the hands of bankers for acceptance or payment, or both. The banker acts as the agent of the party so employing him, and is liable to the responsibilities of an agent. He is not liable for the solvency or for the honesty of those parties, not his own servants or agents, to whom he may have to intrust the document; and so, unless it be an understanding that it is to be taken as cash, a bill or note indorsed to a banker that he may get acceptance or payment, is at the risk of the indorser. In one case a drawer of a bill had a cash credit in which the balance was against him. He handed his bankers a bill which was to be transmitted to India for acceptance and payment, the proceeds being to be put to his credit when paid. After it was paid the proceeds were lost by the failure of the bankers' correspondent, and it was held that the bankers were not liable for the contents.[1] There are special statutory restrictions on the indorsement of bills or notes for sums less than £5, which are mentioned above, p. 307.

SECT. 7.—*Parties to Accommodation Bills.*

Accommodation bills, or wind bills, are a species of document which, with regard to third parties, are in every respect in the same position with other bills, while from the circumstances out of which they have arisen, the obligations between the parties connected with their formation are in many respects different. The accommodation bill is a contrivance for enabling one merchant to support the credit of another, by appearing on the face of such a document as his debtor, and is simply a loan of credit. A friend of the drawer accepts at such a date as a banker will readily discount at. The acceptor, although he runs the risk of being obliged to pay the bill to a third party, does not come under an obligation to the drawer, who is himself the debtor, and understood to be the person who shall pay the bill when due, or, as it is termed, retire it. Meanwhile a banker discounts it, that is, trusting to the credit of the acceptor, and perhaps also to that of the drawer, gives the market-price for it, a sum which is regulated by the time of payment, and the consequent amount of interest and commission for trouble. A bill may be an accommodation from any one or more of the parties appearing on it to any other. It may be drawn or indorsed for the

[1] Ramsay, Bonar, & Co. v. MacKersy, 4th June 1840.

acceptor's accommodation, drawn or accepted for an indorser's accommodation, &c. Frequently a succession of such bills crosses between parties, making their transactions extremely complicated and precarious. "Sometimes," says Professor Bell, "it is necessary to have two or three houses engaged in the traffic; and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are the dangerous and discreditable expedients into which this ruinous practice leads the parties."[1] It is thus the main character of a bill of this class that it sets forth a debt which does not really exist. A bill will not be an accommodation bill, merely because a debt by the drawee to the drawer is not liquid and exigible. In the House of Lords it was found that when a person had gratuitously undertaken the disposal of goods, but had afterwards put them into the hands of another party who was to account to him, a bill drawn on and accepted by him was not an accommodation bill, but one which he was bound to pay, having his relief in the ultimate accounting.[2]

The presumption in the case of every formal bill or note is, that it is drawn for value—it is usual to insert the words "for value received;" but this is held not necessary to the legal presumption.[3] In England it is understood that ordinary evidence is sufficient to meet this presumption; but in Scotland it is held that it can only be redargued by the holder's writ or oath.[4] A late case shows a tendency to relax the old strictness of this rule. The bill bore "for value in grass-park rent." It was dishonoured by the acceptor, and paid by an indorser, who was relieved by the trustee appointed by the drawer's trust-disposition for payment of his debts. On the drawer's death, a representative proceeded against the acceptor. In defence he made certain specific statements, which if proved, tended clearly to show that the debt was the drawer's, and that he acknowledged it as such. The evidence proferred was partly of a documentary nature. The court with some reluctance allowed a proof before answer.[5] It has been already stated, that where the drawee has no effects of the drawer, there is no occasion for notice of dishonour. All accommodation bills are of course in this situation, and thus the onerous indorsee of such a bill has the same claim against both drawer and acceptor that he has in a bill for value, yet is not obliged to use the same vigilance

[1] B. C. i. 426.—[2] Gibson *v.* Rutherglen, 1842, 1 Bell, 519.—[3] Th. 86.—[4] Ibid. 87.—[5] Beveridge *v.* Henderson, 25th November 1841.

in giving notice, for it is a sufficient answer to any objection on the ground of notice that the drawee is proved to have had no effects.[1] If the drawer, however, be not the person accommodated by the bill, he must have notice, that he may have recourse against that party.[2] When the bill is for the acceptor's accommodation, it seems in all respects to resemble a bill for value, for the acceptor, both literally by his acceptance, and virtually by his share in the transaction, is the true debtor. It may be laid down then as a general rule, that a person claiming the contents of a bill from any person other than the primary obligant, must show either due negotiation on his part, or that there was no value, and that the party must have known this to be the case.[3] It does not affect the right of an onerous holder that he knew the person drawn upon was not debtor to the drawer, for the purpose of such a bill is to give the holder of it a right to such security as consists in the acceptance, and no one is presumed to put his name to a bill without either being prepared to meet it himself, or trusting that the party accommodated will do so. Nor in such a case will an omission to give notice affect the right of the holder, even should the drawer prove that he incurred damage from not having received notice, for this is a matter for his consideration when he draws a bill for his own accommodation.[4]

SECT. 8.—*Payment, and Defences arising from the Nature of the Transaction.*

Payment must be made to the proper creditor on the face of the document; and so, if the bill have subsisting indorsements, it cannot be made to the original payee. In the case of accommodation bills, it is usual for the drawer, or whoever may be the party accommodated, to pay or retire his own bill. If the drawer of such a bill discount it with bankers, telling them that it is for his accommodation, and that he will pay it, if they afterwards receive from him, in the course of business, the amount of the bill or more, it is extinguished, and should he fail in their debt, they have no claim on the acceptor.[5] The holder of a bill or note, expressed in terms making it payable to the bearer, is presumed to be the proper creditor in the document, and as such the person entitled

[1] B. C. i. 427.—[2] Bayley, 306.—[3] Goldsmid, &c., *v.* Macneil, 26th May 1814.—[4] Bayley, 294.—[5] Ch. on B. 404.

to be paid the contents, and any reason why he should not be regarded as such, must, in Scotland, be shown and proved by the opposite party.[1]

Fraud, either in the original fabrication of a bill, or in the means by which it is obtained, is a good defence against any holder except a person who is ignorant of the fraud, and has given value for the bill. The law as to the evidence of fraud is not very clearly settled; but it appears to be as follows:— 1*st*, Where the holder is not payee on the face of the bill, yet where it is formal, and appears to have come duly into his hands, though fraud has been proved to have existed in some anterior step of the transaction, he is presumed to be an onerous holder, and proof of his knowledge of the fraud, or his not having given value, will lie with the opposite party; as in the case where bankers discounted a bill blank indorsed, alleged to have been lost or stolen.[2] It would appear, however, that in such a case parole evidence of connexion with the fraud may be adduced, which would not be the case if the holder were payee on the face of the bill, or if it were specially indorsed to him.[3] 2*d*, When the right of the payee is good on the face of the bill, by its being drawn in his favour, or specially indorsed to him, if the granter defend himself on the ground that he adhibited his signature in the course of a transaction in which he was defrauded by the holder, *e. g.*, that he gave it as the price of goods which were never sent to him, he must prove his allegation by writ, or the pursuer's oath.[4] 3*d*, If it is alleged that the bill was fraudulently made, as, that the payee inserted his own name instead of another person's, or altered the sum or the date, as the obligation never was intended to be come under by the party who made it, parole evidence will be received.[5] Parole evidence was admitted along with documentary evidence, to prove that the holder had unfairly acquired a bill, which he did not hold till it was past due and noted for non-payment.[6] *

Usury.—A bill usuriously obtained is invalid in the hands of any one aware of the usurious transaction; it was formerly null in the hands of any holder, but the law on this point has been altered.[7] Transactions on bills at twelve

---

[1] Th. 94.—[2] Scott & Co. *v.* Kilmarnock Banking Company, 27th Feb. 1812.—[3] Th. 95.—[4] Ibid. 96.—[5] Ibid. 99.—[6] Macdonald *v.* Langton, 23d December 1836.—* See farther on the question how far alterations on bills affect the liability of the parties, *above*, p. 312.—[7] 12 Anne, St. 2, c. 16. 58 Geo. III. c. 93. 5 & 6 Wm. IV. c. 41.

months, or only having that period to run, do not come within the usury laws.[1] *

A Bill granted for a Gambling Debt was formerly null against any holder;[2] but it is now in the same situation with a bill obtained for a usurious consideration.[3] †

A Forged Bill is null as an obligation against the party whose name is forged on it, and cannot be available in the hands of any person, however obtained. A person whose name appears on a bill, however, will be barred from pleading forgery if he have admitted the signature as his own, or if he have paid other bills signed in the same handwriting.[4] Acceptance of a bill is held an admission of the correctness of the draft, and it is no defence against an onerous holder that the drawer's name is forged.[5]

Force, Minority, &c.—A bill, like any other obligation, is null as against any person whose signature has been appended in consequence of force or intimidation, and the contents cannot be recovered from him in favour of any party.[6] ‡ The same principle applies to a bill granted by a pupil, and would appear to apply in the case of a minor having curators acting without their consent.[7] §

Bills granted for an Illegal Consideration cannot be enforced by a party privy to the illegality, but are good in the hands of onerous holders.[8] Although a fraudulent consideration may not be proved by parole evidence, an illegal one always can;[9] because, while the former is held ineffectual merely for the sake of protecting a private party, and so the evidence of a genuine transaction appearing on the face of the written document in favour of the receiver is held better than verbal evidence to the contrary on the side of the giver, a bill granted for the *latter* is invalidated, because it is part of the commission of a public offence, in which both giver and taker participate. ||

SECT. 9.—*Prescription.*

It is a good defence against proceedings on a bill or note that it is "prescribed," or that action has not been brought on it within six years from the term at which payment may be

---

[1] 2 & 3 Vict. c. 37.—* As to this subject, see above, p. 133.—[2] 9 Anne, c. 14. Hamilton *v.* Russell, 18th May 1832.—[3] 5 & 6 Wm. IV. c. 41.—† See above, pp. 129, 133.—[4] Th. 339.—[5] Ibid. Bayley, 463.—[6] Th. 103.—‡ See above, 125.—[7] Th. 104.—§ See above, p. 38.—[8] Th. 112.—[9] Ibid. 111.—|| See farther on this subject, p. 128.

demanded, which, in the case of days of grace, will be the last day of grace.[1] If the bill be payable on demand, it is the date of the bill itself; and so if the bill be payable at sight.[2] Bank notes are specially excepted from prescription in the act.[3] This prescription is suspended by the creditor's minority,[4] so that it is presumed, that were a person to indorse a bill to a minor, say two days before the termination of the six years, it would not prescribe against the minor until two days after his reaching majority. Prescription cannot be pleaded where the bill is merely produced as an article of discharge in an accounting.[5] No acknowledgment within the six years of the bill being due will interrupt the prescription, as in other legal prescriptions.[6] Thus, marking of payment of interest within the years—the best proof that the principal was unpaid—was not admitted as an interruption;[7] though in one case the court thought fit, on account of "the special circumstances," to admit a document of date the day before the termination of the six years to elide prescription.[8]

But a separate document, granted within the six years, or after it, may be effectual not as saving the bill from prescription, but independently of it; and if held sufficient for that purpose will carry a prescription of its own, which will generally be the ordinary prescription of debts.[9] It has to be observed, however, that as the prescription presumes payment, no document during the period of prescription will be effectual, unless it be sufficient of itself to constitute an obligation; whereas, after the period of prescription a document merely admitting that the debt has not been paid will suffice.[10] The bill, in short, is destroyed by the prescription, but the original debt, of which it was the representative, if not paid, subsists. There are only two ways, however, in which the statute admits of its being proved: the oath of the debtor, or a writing under his hand.[11] As in the case of the triennial prescription the oath must be taken in all its parts, as a simple admission or denial of the debt;[12] but an oath which admitted the constitution of the debt, but

---

[1] 12 Geo. III. c. 72, § 37. 23 Geo. III. c. 18, § 55.—[2] Moffat *v.* Marshall, 31st January 1838.—[3] 12 Geo. III. c. 72, § 39.—[4] Ibid. §. 40.—[5] Hall *v.* Arnot, 19th December 1837.—[6] Th. 630.—[7] Ferguson *v.* Bethune, 7th March 1811.—[8] Lindsays *v.* Moffats, 19th March 1797, M. 11137.—[9] Watson *v.* Hunter & Company, 18th February 1841.—[10] Th. 639. Campbell *v.* Ballantyne, 21st June 1839. Wood *v.* Howden, 7th February 1843.—[11] 12 Geo. III. c. 72, § 39.—[12] Noble *v.* Scott, 23d February 1843. Galloway *v.* Moffat, 18th July 1845.

was qualified by a vague statement that it had been paid by a relation, precluded prescription.[1] The writ does not require to be down to the date of the demand, for if it show that the debt was unpaid at the termination of the six years, the presumption is against the debtor, and he must show that it has been paid.[2] So it was decided where the debtor wrote to the creditor in these terms:—"Send a copy of the bill, and the payments made on the back of it, so that I may settle the balance."[3] Such a document cannot, of course, prevent any party to a bill, except the author of the document, from profiting by the prescription of the bill. Nor can a writ by a party who is not the obligant have any effect—so, a receipt by a banker-discounter, of the contents of the bill as retired by the drawer, did not save him from the effects of prescription in a claim against the acceptor.[4] Where the party died within the years of prescription, and his son and representative paid a sum to account within the years, yet on the years having elapsed, denied all knowledge of the bill, the plea of prescription was sustained, subject to a reference to the party's oath.[5] In the oath he did not assert that he had made the payment by mistake, and indeed appeared by his deposition to have made it in the understanding that it was a just debt; and he was found liable.[6]

Prescription may be interrupted by action brought by the creditor.[7] The action may be summary diligence (*see Sect.* 11), where that method is competent;[8] or by bringing into court an ordinary action; or by a claim in any competing process, as a Sequestration, Ranking and Sale, &c.;* but the analogy will not hold of a claim in a private trust.[9] It is necessary that the action should have gone to the extent not merely of preliminaries, but of bringing the matter under judicial notice, and of intimation to the debtor. Thus a registered protest was not sufficient without a charge.[10] (*See Sect.* 11.) An ordinary action must proceed to the extent of citation, and if it go no farther, as a citation prescribes in seven years, so will the assistance given by it to the

---

[1] Paul *v.* Allison, 10th March 1841. See Christie *v.* Henderson, 19th June 1833.—[2] Th. 637.—[3] Russell *v.* Fairie, 23d May 1792, M. 11130. See M'Kenzie *v.* Noble, 15th February 1827.—[4] Buchanan *v.* Macdonald, 15th July 1840.—[5] Darnley *v.* Kirkwood, 6th March 1845.—[6] Rankin *v.* Kirkwood, 5th February 1846.—[7] 12 Geo. III. c. 72, § 37.—[8] Fraser *v.* Urquhart, 11th June 1831. Walker *v.* Easton, 17th June 1831.—* See these heads in Index.—[9] Th. 632.—[10] Scott *v.* Brown, 12th December 1828.

bill.[1] If decree has been obtained, the prescription of forty years begins to run, and a decree against one of several acceptors constitutes the debt in the bill against the others.[2]

SECT. 10.—*Lost or Stolen Bill.*

When a bill is lost or stolen it of course ceases to be a document of debt in favour of him from whom it has so passed, but he may still obtain payment by procuring the warrant of a judge, and giving security to the person against whom he claims.[3] If the bill is in his own name exclusively (as by being payable to him by name and not indorsed, or being specially indorsed to him), and so cannot be used by any finder, the security is only against the original holder (or rather an indorsee of his) claiming upon it again, should it be found. If it is in a state in which it may be claimed by any bearer, the security must be to the effect that the original holder will make restitution if a new holder succeeds in a claim for payment.[4] Should the person called upon to pay a bill thus lost, or one which has been destroyed, deny that such a bill had existed, the contents may be established by an action of "proving the tenor," which can only be brought before the Court of Session.[5] The person wishing to have recourse on a bill which he has lost, must attend to all the requisites of protest and notice, &c., as above, in the same manner as if he had the bill in his possession.[6] In the case of bills payable to the bearer, notice of the loss must be sent to all the parties. This notice is different from notice of dishonour, which is merely a personal obligation on the holder, as to which he is acquitted if he have done his best to fulfil it. In the present case, notice must come home to the party, before he can be bound by it.[7] As a matter of prudence, notice should be sent whatever the nature of the bill may be—whether it be in a state in which any bearer may present for payment, or be payable only to a special payee; and all parties should, as far as possible, be warned by advertisement against taking the bill.

SECT. 11.—*Action and Diligence.*

It may be necessary to give a brief view of the manner in

---

[1] Th. 631.—[2] Ibid. 633.—[3] Glen on Bills, 171.—[4] Th. 320.—[5] Ibid. 319. D. P. 505.—[6] Bayley, 302. Th. 511.—[7] Bayley, 131. Ch. on. B. 275.

which bills and notes are made effectual against the parties bound by them, by legal process, though this subject in general belongs to another department of the work.* Bills and notes, like any other obligatory document, may be enforced by a process before any competent court in the ordinary form. In certain circumstances, however, they are specially placed in the class of privileged documents, upon which execution may proceed without action, registration in the books of a court being held equivalent to a decree obtained and recorded in that court.[1] The operation of this practice is more fully explained elsewhere.† To entitle a bill or note to the privileges of summary diligence, it is necessary that there be no defect on the face of it, or that all the requisites as to stamp, sum, signature, absence of correction or erasure, &c., as above described, be fulfilled, and protest must have been taken and recorded.‡ After a bill had passed through several indorsations, addresses were inserted under the names of the Indorsers, which turned out to be more or less erroneous, and they were inserted in the Protest. The House of Lords held that this did not vitiate the bill, as it was the subsequent insertion of words which did not affect the substance of the obligation; and that the protest was not injured by the insertion of this surplus matter.[2]

It will be a good defence against the diligence, and a ground for suspending it, that any of the requisites of due negotiation in presentment, notice, &c., have been neglected. "Summary execution is competent only for the amount of the bill or note, with interest from its date in case of non-acceptance, or from the term of payment in the case of non-payment, as also for exchange of any other sum, if specified in the bill. But such a claim, whether for exchange, re-exchange, damages, interest, or expenses, when not specified in the bill, can be recovered only by ordinary action, or if the diligence is suspended, by being included with the other sums charged for, and thus made the subject of discussion in the suspension."[3] Diligence proceeds against the acceptor of a bill (if it have been accepted), or the maker of a note, and these with the drawer (in the case of a bill) and indorsers (if there be any), are all equally liable, and any one or all may be sued; an indorser from whom payment is

---

* See below, Part XIV.—[1] 1681, c. 20. 1696, c. 36. 12 Geo. III. c. 72. § 41. 23 Geo. III. c. 18, § 55.—† See below, Part XIV.—‡ See above, p. 319.—[2] Russell v. Creighton, 11th May 1843. 2 Bell, 81.—[3] Th. 553.

exacted having recourse against previous indorsers and the drawer. If the bill have not been accepted, diligence proceeds against the drawer and indorsers. An acceptor can bring no action on the bill, but if he have accepted it for accommodation, he has indemnity against the party accommodated.[1] Summary diligence on bank notes embraces interest from the period of demanding payment.[2] Summary diligence does not proceed on checks or drafts on bankers.[3] In 1838, the process of summary diligence was simplified, and extended to Sheriff Courts.*

[1] Th. 579. Statutes as above.—[2] 5 Geo. III. c. 49, § 4.—[3] Th. 557.—
* See Part XIV. Chap. V.

PART XII.

SECURITIES.

CHAPTER I.

Personal Bonds.

The bond to pay money is a simple obligation, depending for its efficacy on the possession of the usual requisites of an obligatory deed, as detailed above.* As a bill or promissory note is a more simple and economical method of constituting a personal obligation, the simple moveable bond is seldom resorted to, unless there are specialties and conditions to be engrossed in it, or the money is likely to remain unpaid beyond the six years on the expiry of which bills and notes prescribe. Bonds carry the long prescription of forty years.[1] Moveable bonds, when they had a clause obliging the debtor to pay interest, were formerly heritable. By statute they were made moveable in questions of succession, but they remain in their old position in questions between husband and wife.[2]† The bond generally contains a clause imposing a penalty in case of failure to pay or perform in terms of the principal obligation. The usual nominal fixed penalty for the failure of any payment is "a fifth part more." Both the penalty and the primary obligation are exigible, and it was so found where the usual qualification that the penalty is to be payable "over and above performance" had been omitted.[3] It is a general rule, however, that every

* See p. 154, *et seq.*—[1] B. C. i. 335.—[2] 1661, c. 32.—† See above, p. 48.—[3] Beattie v. Lambie, M. 10039.

stipulated penalty over and above performance is liable to an equitable reduction by the court to meet the damage actually incurred, though a penalty in the form of an alternative *instead* of performance is not.[1] A bond will generally contain a clause of "registration for execution," in virtue of which it may be enforced without litigation. In terms of this clause the bond is registered in the books of a court having jurisdiction to enforce it, and execution against person and property will proceed on an extract from the record.[2]

The above remarks apply to the simple bond for the payment of money. The personal bond as associated with other obligations is of frequent occurrence, and is considered in connexion with several departments of the law. Cautionary obligations, whether for the payment of money or for faithful performance, are generally accomplished by personal bonds; and a security for a cash credit is probably more common in this form than in that of a real security.* The collateral obligation for payment of a composition contract by a bankrupt belongs to the same class of obligations.† The heritable securities, and the maritime hypothecations of ships and cargoes discussed in the pages immediately following, are also accompanied by personal obligations of the character of a Bond. (*See below*, p. 354.)

CHAPTER II.

Heritable Securities.

Sect. 1.—*Wadset and Annualrent Right.*

The Wadset, the earliest method of granting security on land in Scotland, though still legal, is seldom if ever practised. By this deed the borrower and proprietor conveys the land to his creditor, who may infeft himself as in the case of

---

[1] E. iii. 3, 86. Home *v.* Hepburn, M. 10033. Semple *v.* Semple, M. 10033. Cochran *v.* Montgomery, M. 10041. Bairdener *v.* Drysdale, M. 10043. P. Lord Meadowbank in Mackenzie *v.* Craigies, 18th June 1811. —[2] Jur. St. ii. 24, *et seq.*—* See above, p. 224.—† See Part XIII. Chap. VI. Sect. 2.

a purchaser, so as to hold either of the person conveying to him or of that person's superior.* As the creditor, or Wadsetter, holds the land only in pledge for the money he has lent, there is a clause, to the effect that on the money being repaid at a particular time, the land shall revert to its former possessor, who is thence termed the Reverser. There were, during the earlier part of the period when this deed was in use, considerable difficulties as to its custody, the two parties possessing interests opposed to each other. The evil was remedied by the registration laws, in virtue of which the right of reversion was published on the face of the title. Wadsets are divided into two sorts, Proper and Improper. When the wadsetter enters on possession, and takes in place of interest the yearly fruits with risk of the seasons, it is a Proper Wadset. When he agrees to accept of a fixed yearly sum as interest, and accounts to the reverser for the rents, the Wadset is Improper. An improper wadset may be created out of a proper one, by the wadsetter letting the land in tack to the reverser for a yearly rent, which comes in place of interest.[1]

Infeftment of Annualrent was another method of creating a security on land, applied to baffle the canonical prohibition of interest. It is said to have originated in the alleged attempt of Robert III. to abolish subinfeudations in Scotland, as had been done in England, when the subvassals came to be in the situation of tenants. A proprietor who wished to raise money is presumed to have sold a portion of the rents to be paid to him by such tenants, putting the lender of the money in his own situation as to these rents. In this view the security was of the same nature as the English rent-charge. Under the practice of subinfeudation, a right of annualrent, or a right to an annual sum, payable from the lands, and secured on them by an infeftment, was taken by the lender as security for his money.[2]

SECT. 2.—*Heritable Bond, and Bond and Disposition.*

The lender on such a security as the last mentioned, having no method of compelling the borrower to repay, a deed was invented by which, in the manner of a personal bond, the borrower obliged himself to repay the sum lent, with interest and penalty, in security of which the creditor was

---

* See above, p. 168.—[1] St. ii. 10. E. ii. 8, 3-30. R. L. ii. 330, *et seq.*—[2] St. ii. 5. Kames' Hist. Law Tracts, 157, *et seq.* E. ii. 2, 5; ii. 8, 31-34.

infeft in an annualrent as above. This method being still defective, as it failed to give the creditor a method of recovering his capital from the lands, the heritable bond was invented, containing an obligation on the borrower to infeft the creditor not only in an annualrent of the lands corresponding to the debt, but in the lands themselves, in farther security of the principal sum, interest, and penalty. There is generally a clause of registration for execution as above. In the simple heritable bond some debtors merely oblige themselves personally to repay the money with penalty and interest, and to infeft the creditor in an annualrent on the lands, and on the lands themselves in security. Others insert a dispositive clause, *conveying* the lands in security; but this is presumed to be unnecessary to the pure heritable bond, and to be a confusion of it with the heritable bond and disposition in security.[1]

Disposition in Security.—This form of security on land is an improvement on the former, in as far as it affords a more expeditious method of making good the debt, by giving the creditor a power or commission to sell the lands in certain circumstances. The deed contains a disposition of the lands, and a power to sell them. The debtor is protected from advantage being taken of this power, by a clause that there shall be certain forewarnings to him of the intention of the creditor, and advertisements, without which the creditor is precluded from selling, and his attention to which is strictly interpreted. If there is a defect in this portion of the deed, the court will interpose to prevent the property from being surreptitiously disposed of. The creditor is not entitled to sell the land and possess himself of the proceeds; he can merely pay himself, and must account to his debtor, or more generally to the creditors of his debtor, for every farthing. Lest a conveyance in terms of the power should not be held an effectual conveyance of itself, the authority of the court is occasionally interposed; yet there seems little doubt that a conveyance, after all the conditions of the bond and disposition are attended to by the creditor, is perfectly good.[2] The lands may be encumbered by other heritable burdens. In judicial sales, and in sales under the sequestration law,* the burden is limited to the amount of the price, but in the case of a sale by such a power, the securities remain as encumbrances on the land in full force. In such

[1] R. L. ii. 378. Jur. St. i. 307.—[2] Brown v. Storie, 11th June 1790. M. 14125. B. on C. T. 90.—* See Part XIII. Chaps. III. and IV.

circumstances the purchaser will generally use his right (under covenanted restriction) of retaining the price till encumbrances are cleared off. (*See above*, p. 168.)

Securities for Future Advances.—At an early period of the history of heritable securities it became an object with borrowers to grant securities not only for the sums they had borrowed, but for such as they might find it afterwards convenient or necessary to borrow. This was effected by a modification of the wadset, but being considered dangerous to the rights of creditors, it was abolished.[1] A method of security for such supplies was afterwards invented in the precarious deed termed *Absolute Disposition with Back-bond.* The absolute disposition is a complete conveyance of the lands to the creditor. The back-bond is a personal obligation by the creditor to restore them on payment of his money. After infeftment is taken on the disposition, and recorded, should the back-bond not be recorded in the register of sasines, the creditor may defeat the debtor, by making a conveyance of the lands.[2] An exception was introduced by statute, to the act against securities for future advances, in the case of securities for cash-credit with bankers. These, so far as they are connected with cautionry, have been already considered (p. 224), and it only remains to say, that the transactions may in the same manner be covered by a security on land.[3]

The holder of a bond and disposition in security, if he desire to have his title secured against other deeds, or against the operation of creditors, must be infeft, and his title is protected by the same operations, and liable to the same objections, as that of a proprietor.* There must also, where the original holder's right does not admit of subinfeudation, or where no subfeu is intended, be an entry with the superior, in the same manner as a purchaser enters; and until this is completed, the security is defeasible.[4]†

There will be variations in the transaction according as the granter of the security has his own title made real or not, though it is a complex operation to take a good security from a proprietor uninfeft, and the attempt is seldom considered advisable. When the lands hold burgage, the method of transference applicable to that species of property must be adopted.‡ A minor class of securities applicable solely to burgage property is mentioned below.

---

[1] R. L. ii. 339. 1696, c. 5.—[2] B. C. i. 672.—[3] 54 Geo. III. c. 137, § 14.—* See above, p. 55.—[4] See Jur. St. i. 311.—† See p. 172.—‡ See p. 58.

SECT. 3.—*Transference and Extinction of Heritable Securities.*

Formerly heritable securities could not be transferred without a Disposition and Assignation, containing a long narrative of the granting of the original deed, with the infeftment on it, a conveyance of the Lands and Annualrent, with Obligation to Infeft and Procuratory of Resignation, Warrandice, Assignation of Title deeds, &c., which was followed by the ceremonies of Infeftment, Entry with the superior, &c. Like ceremonies attended the completion of the right of representatives to such securities, and the extinction of securities was accompanied by cumbrous forms. An abbreviated method has now been supplied by statute, but it is still optional to adopt the old system.[1]

By the new system, a brief form of assignation is supplied, which is made effectual to put the assignee in the cedent's place, by being recorded in the Register of Sasines. When the assignation is contained in a deed for ulterior purposes, as a marriage contract or a family settlement, the whole deed need not be recorded, but a notarial instrument may be prepared in which the part not relating to the security may be set forth generally, while the part relating to the security is repeated at length.[2] The heir of a person who has died vested in a security, may complete his title by a Writ of Acknowledgment, granted in his favour by the owner of the property, infeft. On the recording of this writ, the heir is held to be invested, and to have entered with the superior.[3]

An heir served and retoured, or a general disponee, may in the same manner complete his title by recording a notarial instrument according to a form provided by the act.[4]

Discharge.—Any heritable security may be discharged by entering in the Register of Sasines a Discharge in the form prescribed by the act.[5]

All these several species of writ are appointed, on their presentation at the Record of Sasines, to be shortly entered in the minute in common form, and then recorded at length, and redelivered with Certificates of Registration. Assignations are registrable at any time. They are preferable according to the date of registration; and the time of entry in the Minute Book is held to be the date, in all competitions, and in questions under the Scottish Bankrupt acts.[6]

---

[1] 8 & 9 Vict. c. 31, § 9.—[2] Ibid. § 1.—[3] Ibid. § 2.—[4] Ibid. § 4.—[5] Ibid. § 8.—[6] Ibid. § 5-7.

SECT. 4.—*Security by Reserved Burden.*

This is a form by which a person disposing of landed property may burden it with payment of a sum of money, or may secure a sum of money upon it. It saves the expense of procuring an heritable bond from the new proprietor, and can be used in cases to which an heritable bond does not conveniently apply. The seller of land may make it the means of having part of the price secured on the land, of securing a provision for his children, or of paying his debts. To accomplish such purposes the reservation may be made either in favour of the disponer or of a third party. To make the right effectual it will not suffice that the deed bear, however explicitly, that the acceptor is liable for the debt; the debt must be in most distinct terms declared to be a burden on the lands themselves, and it must be so expressed in the dispositive clause* and sasine.† The burden must be specific in amount, and the creditor must be named; so no one can convey with a real burden to pay his debts, without stating the amount and the creditors' names. To make it according to principle a real burden, the acceptor of the conveyance must be infeft, and his sasine recorded; but should he omit to make up his title, no one can acquire through him a real right to the land, otherwise than with the burden. The person in whose favour the burden stands has not what can be termed any real right in the lands;—he cannot enter practically in possession;—he holds no security over them by bond or otherwise;—his right consists in the limitation on the proprietor's right. It does not therefore require to be completed in his person by sasine, and when he transfers it, he does so by a simple assignation, which is made preferable by being intimated to the proprietor. He is merely a creditor, and must make good his right as other creditors of the proprietor by adjudication, &c.;‡ but then he is a *preferable* creditor, with whom none of the other creditors of the proprietor can compete.[1]

SECT. 5.—*Faculty to burden.*

A proprietor disposing of land may not only burden it with payment of a certain sum, but may retain a right or Faculty to burden it at a future time, and that faculty may be re-

---

* See above, p. 52, 168.—† Ibid. p. 55.—‡ See Part XIV. Chap. VII. Sect. 2.—[1] E. ii. 3, 49, 50. B. C. i. 686, *et seq.*

tained either to be exercised by himself, or to be exercised by a third party. The extent to which the burden may be exercised must be defined. Until the person to whom the lands are conveyed is infeft, it does not form a real restriction on his right, and while he is uninfeft, all real right is in the granter of the deed. The faculty becomes extinguished by the death, without exercising it, of the person in whose favour it is reserved. Meanwhile, as it is a burden affecting the creditors, both of the disponer and acquirer of the land, it cannot be exercised, so far as third parties are concerned, secretly by a personal deed. The faculty can only be made use of by a conveyance, giving a real right to the extent of the reservation, and appearing on the record; so long as the right is not so used, it is liable to be attached by the creditors of the person in whose favour it is reserved. Its exercise by a personal deed makes the holder of that deed a creditor of the acquirer of the property, but gives him no preference, at least over heritable creditors, and in the opinion of lawyers, not over personal.[1]

SECT. 6.—*Jedge and Warrant.*

A jedge and warrant is a security on burgage subjects entered in the books of the Dean of Guild. It has its foundation in the exercise of the municipal jurisdiction of that officer, in causing ruinous tenements to be repaired. When a tenement is in disrepair, any one having an interest may present a petition to the dean, praying that the building may be repaired, and the cost declared a real burden on the property. A jury is appointed to visit the premises and judge of the necessity of the repairs, and, when they are thus approved of and finished, the amount of the audited account is declared to be a real burden. A purchaser of burgage property should thus, besides the Burgh Register, consult the books of the Dean of Guild.[2]

SECT. 7.—*Securities for Government Advances for Drainage.*

A new species of security on land has been created by statute, for advances made out of the consolidated fund or on exchequer bills, for the improvement of lands by Drain-

[1] E. ii. 3, 50. B. C. i. 40, *et seq.*—[2] Jur. St. i. 622-636. B. on C. T. 138.

age.[1] Advances under the act may be applied for by persons in the possession of land, and provision is made for persons having reversionary interests being warned, and for their appearing and discussing the matter in the Court of Session.[2] The advance is repayable by instalments at the rate of 6½ per cent. per annum for twenty-two years.[3] The amount is recoverable in the same manner as feu-duties, and it is declared, in general terms, that it "shall be subsequent in order of law to any feu-duty, but shall have preference over all other charges on the same land."[4] The execution of the act is in the hands of the Enclosure Commissioners of England. When they are satisfied with the execution of the works, they grant a certificate to the treasury for an advance. The certificate specifies the lands to be held in security, and the amount of advance. A duplicate of it is sent to the applicant for the advance, who must have it entered in the Register of Sasines, and return it with a certificate of Registry to the commissioners.[5]

CHAPTER III.

PLEDGE.

PLEDGE is defined "a contract, by which a debtor puts into the hands of his creditor a special moveable subject in security of the debt, to be redelivered upon payment."[6] Its most extensive exercise in this country is under the warehousing act and the pawnbrokers' acts. The security of the person who advances the money (the pledgee) is in the right to dispose of the pledge if the sum be not repaid at a certain fixed period; but, except where it is otherwise provided by statute, a warrant of sale must be obtained from a judge, on the pledgee's petition.[7] Where bills are pledged, however, either specially indorsed to the pledgee or blank indorsed (if such a transaction can be termed pledge), it is held that the pledgee may negotiate the bills without judicial authority.[8] Title-deeds, securities, and other documents of debt are frequently the subject of pledge. In such a case the pledger does not

[1] 8 & 9 Vict. c. 101.—[2] Ibid. §§ 8, 21-23.—[3] Ibid. § 34.—[4] Ibid. § 35.—[5] Ibid. §§ 9, 28, 29.—[6] E. iii. 1, 33.—[7] Ibid. B. C. ii. 22.—[8] Ibid. 23.

make over his right, or even a burden on it, and no sale can take place to refund the pledgee. His security consists in a mere right to retain what is useful to another, and may be necessary to enable the pledger or his creditors to realize the property; but if the property can be made use of without the documents pledged, the pledgee cannot interfere.[1]

There are certain statutory regulations for the mutual rights and obligations of parties, where effects are pledged to licensed pawnbrokers; thus a pawnbroker refusing to restore a pledge for any sum under £10, on tender of the loan and interest, before the time of redemption has elapsed, may be brought before a justice of peace, and compelled to make restitution, under pain of imprisonment.[2] The general statutory regulations as to pawnbrokers and their conduct, whether to individuals or the public at large, is so intimately connected with police regulations, as to belong properly to the department of Public Law.

CHAPTER IV.

LIEN AND RETENTION.

SECT. 1.—*General Principles of Lien.*

LIEN is a right on the part of a creditor to retain property of a debtor lying in his hands, until a claim by him against the proprietor is satisfied. To establish lien there must be actual possession in some capacity or other, either by the creditor himself or, on his account, by those in his employment. Thus no lien was established in favour of factors to whom a cargo had been sent, and who had failed the day before the ship arrived.[3] Where bankers, having applied the property of a customer to their own uses, enclosed, along with a receipt for the sum, certain bonds covering the amount, sealed them, wrote on the packet, "The property of J. B. Esq.," (the creditor), deposited them among the securities belonging to their customers, and sent the packet to a person to whom it was addressed,—on their coming to the resolution to stop

---

[1] Ibid. 24.—[2] 39 & 40 Geo. III. c. 99, § 14.—[3] Kinloch v. Craig, 1789, 3 T. R. 119.

payment, there was found to be no lien to interfere with the right of the creditors.[1] The general tenor of the cases on this subject would lead to the inference that where there is only such partial transference as in sale would justify stoppage in transitu* there is no lien.[2] The possession must be lawful and in the regular course of business, not obtained surreptitiously or by misrepresentation.[3] If the property is put into the hands of the creditor in the understanding that he is to apply it to a specific purpose, separate from his transactions with the debtor, there is no lien. This may be exemplified by the case where one had given money to another to pay a bill, who, calling at the bank and finding that the bill was not at hand, credited the sum in his books, and unsuccessfully claimed retention for a sum due him.[4] One who had requested to have a ship's certificate from the shipmaster that he might pay the duties, was found not entitled to retention for a debt due to him as agent.[5]

The lien terminates with the possession, and it seems rightly held that as it arises out of the contract by virtue of which the possession exists, it cannot be restored by mere recovery of possession.[6] Thus where a carrier owed a sum of money at an inn for the keeping of his horses at various times, though the innkeeper had a lien on them for the debt incurred at each visit, and could have retained possession, yet, having let them depart, he had no lien on their coming back for what was due on former occasions.[7]

The value of a lien as a security must be deducted from the debt of a creditor ranking in a sequestration.[8]

SECT. 2.—*Special Liens.*

The consistent and original operation of lien is *special.* It is simply the retention of the subject-matter of a special contract, on the principle that one party cannot be compelled to perform his part in the contract by delivering the subject of the bargain, until the other party is ready to perform *his.* This lien holds,

1*st*, *On a ship* for repairs, when the vessel has come into the possession of the shipwright, and is not merely in open harbour.[9]

---

[1] Wilson *v.* Balfour, 1811, 2 Camp. 579.—* See above, p. 164.—[2] See B. C. ii. 92.—[3] Madden *v.* Kempster, 1807, 1 Camp. 12.—[4] Stewart *v.* Bisset, 16th February 1770, M. Compensation, Ap. 2.—[5] Burn *v.* Brown, 1817, 2 Stark. 272.—[6] B. C. ii. 93-95.—[7] Jones *v.* Pearle, Strange, 556.—[8] 2 & 3 Vict. c. 41, §§ 3, 37.—[9] Abbot, 143, *et seq.*

2d, On goods conveyed by land or water, which are liable to the carrier or shipowner for carriage dues, or freight. There is no lien for dead freight or demurrage,* unless it be stipulated for.[1] Goods landed in docks, licensed under the general warehousing act, continue liable to lien for freight; and the proprietors of the docks are bound to detain them on receiving notice, until the claim be paid, or its amount deposited with the dock-keepers:[2] but goods lodged in other docks, where the lodging is not compulsory, are not so liable.[3] There is no lien on a passenger or on the clothes which he wears, for his passage-money, but there is a lien on his luggage. This has been decided in the case of a passenger by a vessel,[4] and the same rule would probably be extended to a traveller in a land-conveyance.[5] In land-carriage there is no lien for the expense of booking.[6]

3d, On a vessel or cargo for salvage,† and also for general average,‡ the shipmaster in this case acting as factor for all concerned, and being responsible for making the claim effectual.[7]

4th, Innkeepers and stablers have a lien over the luggage, horses, and carriages of travellers, for the price of their entertainment. In England the privilege seems to be granted on the principle of the innkeeper not being entitled to refuse visiters, and of his responsibility for the safety of their property,[8] and is held not to extend to livery stablers, unless by special stipulation;[9] but it is maintained that no such exception would be received in Scotland.[10]

5th, Cattle pastured in a field are liable to a lien to the owner for the amount of the grass mail.[11]

A workman into whose hands a piece of property is put for the purpose of being manufactured or of undergoing any operation, has a lien for his remuneration.[12] Unless where there is a general lien (*see the next section*) he has no right to retain one subject for the work done to another;[13] but where portions of the subject of one bargain are delivered, and redelivered at different times, a lien rests over any portion remaining in hand for the expense against the whole.[14] This principle was held to extend to the case of a printer

---

* See above, pp. 274, 276.—[1] B. C. ii. 99, 100.—[2] 8 & 9 Vict. c. 91, § 51.—[3] Johnston *v.* Duncan, 16th May 1827.—[4] Wolf *v.* Summers, 1811, 2 Comp. 631.—[5] B. C. ii. 182.—[6] Lambert *v.* Robinson, 1793, 1 Esp. 119.—† See above, p. 281.—‡ Ibid. p. 280.—[7] B. C. ii. 103. Abbot, 398.—[8] Thompson *v.* Lacy, 1820, 3 Barn. & Ald. 283.—[9] Wallace *v.* Woodgate, 1824, 1 R. & M. 193.—[10] B. C. ii. 104.—[11] Ibid.—[12] Ibid.—[13] Ockenden, 1754, 1 Atk. 235.—[14] Chase *v.* Westmore, 5 M. & S. 180.

employed to print several numbers (not consecutive) of a work, charging separately for the printing of each number, who was allowed a lien over a portion remaining in his hands.[1]

SECT. 3.—*General Lien.*

General lien is a security, founded on an exception being admitted in particular cases, to the limitation attending special lien. In special lien the right of retention is simply the right in the one party to refuse delivery of a piece of property, about which the parties have contracted, until the other party tender performance of his part of the contract: and so there is no special lien on the subject of one contract for the performance of another. Where general lien, however, is admitted, it holds for the general balance of accounts between the parties, whether for the particular contract connected with the property retained, or for previous contracts connected with the same train of transactions. Thus, where A and B had purchased from C and D three lots of sugar without paying the price, and bought a fourth for which they paid in cash, the sellers were entitled to retain the last lot in security of the balance due them.[2] General lien has been admitted in the following cases:—

1*st*, In successive purchases for the balance, as in the last cited case.

2*d*, To law-agents for their professional accounts, and factors for the balances on their general accounts.[3 *]

3*d*, Bankers have a lien over bills of their customers in their hands, unless they have been discounted by the banker (in which case he has bought them), or they are put into his hands for a special appropriation.[4] In bankruptcy the effect of the lien is this, that whereas in the discounting of a bill the banker makes a separate purchase for which he pays, if the parties to the bill become bankrupt, the banker cannot, by ranking on their several estates, get more than the amount of the bill, so as to make it pay any part of his general balance with the indorser; when he has a lien on a bill, however, the banker (except when the special rules of the sequestration act interfere) may first rank for his whole balance, and then use the bill to recover what the dividend does not meet.[5]

---

[1] Blake *v.* Nicolson, 3 M. & S. 167.—[2] Mein *v.* Bogle & Co., 17th January 1828.—[3] E. iii. 4, 21.—[*] See above, pp. 246, 250.—[4] Iv. Er. 714.—[5] B. C. ii. 118.

4th, Insurance brokers have a lien over the policies of the assured and sums due him for loss, for premiums, and a general balance against him.[1] *

5th, General lien may be grounded on the usage of trade, or the custom of the district,—in England it has been sanctioned in the cases of calico-printers, dyers, wharfingers, and packers, but not in that of fullers.[2]

6th, The manner in which the parties deal with each other is sometimes the foundation of a general lien, as where in a succession of contracts the payment instead of being for each parcel of goods, is periodical, it being held that the manufacturer or other person giving up his lien on each particular parcel, is entitled to retention of what may be at any time in his hands for a general balance. It was so found in several cases respecting bleaching.[3]

SECT. 4.—*Retention of Money.*

The right to retain money is often confounded both with Lien and Compensation, but belongs properly to neither department, and should be considered separately. The security held by a Lien need not bear any proportion in value to the debt for which it is retained, but it is clear that a large sum immediately payable cannot be retained as security for a small contingent debt. Lien is scarcely ever constituted unless in security of a debt payable at the time; but Retention of money necessarily supposes that the debt is future or contingent, for if it were not there would be compensation in which the one debt would extinguish the other. The following principles apply to the retention of money:—

A trustee has a right to retain trust-funds for his outlay in the affairs of the trust.[4]

" *Cautioner.*—A person who has come under a pecuniary guarantie or cautionary obligation for another, is entitled to retain any money he may owe to that party, until he is relieved of his obligation.

" *Claim in Bankruptcy.*—A person who is creditor in a future or contingent claim, and who, on the other hand, owes the future or contingent debtor a liquid debt, may, if that person become bankrupt, retain the liquid debt as security, or eventually as compensation, of the future or

---

[1] Park on Insurance.—* See above, p. 197.—[2] Sir E. Tomlyn's Law Dictionary—*Lien.*—[3] B. C. ii. 109.—[4] Ibid. 123.

contingent debt. A sum which is instantly payable in consideration of the undertaking of a contingent obligation, cannot be balanced against the contingency, even if the obligor become bankrupt; and it has been specially found that a party insured cannot, while the risk is undetermined, compensate the premium against the contingency, on the underwriter's bankruptcy.

"*Bill.*—It is held that the person who is responsible on the face of a bill for behoof of another, has retention of any debt due by him to the person accommodated, which will operate in the case of a mutual bankruptcy, in which the bill ranks on both estates.

"*Tenant.*—A tenant under lease, in which payment for meliorations is stipulated, may retain the rents from the time when the obligation becomes prestable, and pay himself." *

CHAPTER V.

HYPOTHEC.

SECT. 1.—*Miscellaneous Hypothecs and General Principles of Hypothec.*

HYPOTHEC is a preferable right in security over moveable property, which differs from Pledge and Lien in this, that the subject is not in possession of the person who has the right of security over it, but remains in the hands of the proprietor. As the progress of commerce generated transactions often undertaken on no better security than the apparent affluence of a commercial man, judged of from the quantity of his stock, it was felt dangerous to allow goods to appear as part of the stock of one man while they were in reality under pledge to another. Hence, in those countries where hypothecs are chiefly countenanced, they are limited in their operation and must be solemnly recorded; and in Britain, except where they have been established by a long train of practice, hypothecs are not sanctioned. Where there is no hypothec by custom, it cannot be

* Extracts from the author's Law of "Bankruptcy," &c., where (p. 23-26) the subject is investigated at length.

constituted by special contract, except in the contracts of Bottomry and Respondentia.[1]

Tacit.—The principal tacit hypothec, or hypothec coming into existence from the mere position of parties and without any stipulation, is the landlord's hypothec over his tenant's moveables (*see next Section*). The superior has a similar and preferable hypothec for feu-duties; and so when a quantity of materials for carpenter's work, with tools and furniture, were laid on the premises of an urban tenement, the superior was held entitled to recover them for the feu-duty after they were sold and paid for.[2] The law-agent's preferable right to get payment for his professional charges from the costs awarded against the opposite party is termed a hypothec.* It is believed that freighters of goods would be found to have a hypothec over the vessel for damage occasioned to them.[3] There is a hypothec on a ship for repairs made on it abroad.[4] The excise consolidation acts give a hypothec over the taxed commodities for arrears of duties on them.[5]

SECT. 2.—*Landlord's Hypothec.*

In Agricultural Leases the landlord's hypothec extends over the produce of the ground in general, and over the tenant's live stock. As to the former, the hypothec is over every individual portion, so that while the landlord's rent is unpaid, he can deprive the tenant of the commercial use of it; but over the live stock the hypothec is merely general, the tenant having the management, and being entitled to increase the security by adding to his stock, or to decrease it by selling.[6] Whether the hypothec extends over the tenant's furniture and implements is doubted.[7] It has been specially decided that cheese, the produce of the farm, comes under the hypothec.[8] In grass farms the hypothec extends over the live stock of the tenant, but not over the cattle of others taken in to graze.[9] The produce of the ground is under hypothec for the rent of that year of which it is the crop, and not for that of a prior or subsequent year. The hypothec over the live stock exists for each current year; so that if it is not had recourse to for the rent of one year,†

---

[1] E. iii. 1, 34.—[2] Youille *v.* Lawrie, 24th January 1823.—* See as to this, above, p. 250.—[3] B. C. ii. 39.—[4] E. iii. 1, 34.—[5] 4 & 5 Vict. c. 20, § 24.—[6] E. ii. 6, 61. H. on L. & T. 678.—[7] H. on L. & T. ii. 352.—[8] Goldie *v.* Oswald, 25th January 1839.—[9] H. on L. & T. ii. 351.—† See Part XIV. Chap. VI. Sect. 3.

it remains as a security for the next year's rent, being only liable for one year's rent at one time.[1] During the continuance of the hypothec, if the produce is sold by private sale, or otherwise conveyed away, the purchaser is liable to restore it to the landlord, or pay the value in as far as it does not exceed the rent due.[2] A purchaser by bulk in open market is safe, but it would appear that he would be held liable if warned that the rent had not been paid.[3] A purchaser by sample in open market is liable.[4] It was found that where an increase of rent was stipulated for in the case of a deviation from a prescribed rotation, the increase was covered by the hypothec.[5] It has been supposed that it is only when the tenant is in difficulties that the landlord is entitled to interfere with the sale and removal of the tenant's crop; but it has been found that, without reference to such a circumstance, the landlord is entitled to interdict the sale and removal of growing crop, until the tenant finds security for the current year's rent.[6]

Houses and Shops.—The furniture of a dwelling-house is liable to hypothec. "But the tenant may *bonâ fide* dispose of such articles of furniture as he does not need, and a fair purchaser is safe if there have been no sequestration."[7] Whether the effects of temporary inmates are liable has not been decided. It seems to be understood that hired furniture is liable. Whether furniture deposited or lent without hire is liable seems rather more doubtful.[8] Where it was decided by a court of law that the tenant had wrongful possession of the furniture, the hypothec was found not to apply.[9] In a shop the hypothec extends over the goods, somewhat in the same manner as over the live stock in a farm,—the tenant has the unlimited disposal of the goods if there is no collusion.[10]

In Manufactories the right exists in the same manner over the stock of goods, and extends to the machinery. Where the amount to be paid for steam and water power by a tenant in a manufactory was left to arbitration, the House of Lords found that it was not covered by the hypothec.[11]

The hypothec exists for three months after the term at which the year for the rent of which it is a security expires.[12]

---

[1] B. C. ii. 33. E. ii. 6, 62.—[2] E. ii. 6, 60. H. on L. & T. ii. 363.—[3] Cooper *v.* Bone, 18th December 1823.—[4] H. on L. & T. ii. 387.—[5] Robertson *v.* Clark, 1st June 1842.—[6] Preston *v.* Gregor, 26th June 1845.—[7] H. on L. & T. ii. 358.—[8] Ibid. 358-363.—[9] Jaffray *v.* Carrick, 18th November 1836.—[10] H. on L. & T. ii. 363.—[11] Catterns *v.* Tennent, 12th May 1835, 1 S. & M'L. 694.—[12] E. ii. 6, 62.

The landlord can not only prevent the subject of his hypothec from being sold, but can interrupt the attachment of a creditor unless he offer security for the rent.[1]

Where there is a sublease the subtenant is liable to the hypothec of his immediate landlord. He is likewise subject to the hypothec of the proprietor for the rent due by his immediate landlord. Where the privilege to sublet exists, and its exercise is intimated to the proprietor, the hypothec against the subtenant is only to the extent of the rent he is due, and he relieves himself by paying it to his immediate landlord. If the sublease have not been intimated he is subject to the proprietor's hypothec for the whole rent due to him.[2]

SECT. 3.—*Bottomry and Respondentia.*

Bottomry and Respondentia are contracts by which money is borrowed, on the chance of a voyage being successful, on interest or a premium, according to the extent of the risk. The contract is called Bottomry when the money is borrowed on the ship,—Respondentia when on the cargo. In a bottomry-bond the security is not merely personal but real over the ship, which is hypothecated for the creditors' security. In respondentia it is questioned whether a similar hypothec of the cargo can be created, and it is said that there does not "seem any mode by which a person who advances money at respondentia upon goods laden or to be laden on board a ship on an outward and homeward voyage, can resort for the payment of his debt to the specific goods that may be brought back."[3] A respondentia bond is of very rare occurrence in this country.

The legitimate use of a bottomry-bond is to obtain money which will enable the voyage to be completed, repayable only if that event take place. Hence it is not applicable to a vessel in a home port, and it does not appear that a security can be created over a vessel in such a position, except in terms of the registry act, as above noticed[4] (p. 174). The master is, at all events, not authorized to give a security over the ship in a home port,—the owners alone have that power. When the master borrows on bottomry in a foreign port, the bond should narrate that the sum is necessary for the prosecution of the adventure.[5] There is no re-

---

[1] E. ii. 60.—[2] Ibid. 63. H. on L. & T. ii. 397-399.—[3] Abbot, 153.—[4] Ibid.—[5] Marshall, 749. Smith's M. L. 380-385.

striction on the amount of interest which may be covenanted for in a bottomry-bond.[1] In ranking with each other, bottomry-creditors are in this peculiar position, that the holder of the security last in date is preferred, as having been most conducive to the success of the adventure, the others ranking on the same principle, each according to his posteriority.[2]

---

[1] Marshall, 756.—[2] B. C. i. 535. Smith's M. L. 385.

PART XIII.

INSOLVENCY AND BANKRUPTCY.

CHAPTER I.

Ranking of Creditors.

The Law of the Ranking of Creditors embodies the order in which claimants of different kinds are entitled to be paid out of their debtor's estate. When the estate is solvent, this branch of the law has no practical application to it, and it is therefore considered under the head of Insolvency and Bankruptcy, where, the estate being avowedly insufficient to meet all the demands on it, the rules which give some creditors a preferable claim to others are important. In all the methods of distribution followed by the Bankrupt Law—in Sequestration, Cessio, Voluntary Trusts, &c., the rules as to the ranking of creditors have more or less application, and therefore this subject is made introductory to the other departments of the Bankrupt Law.

Sect. 1.—*Privileged Debts.*

When the estate is insufficient to meet all demands, a creditor may have a preference over others, either by the nature of his debt, in which case it will extend over all the available estate of the debtor; or from a security, either legal or conventional, over a particular article of property, in which case the preference only holds in so far as it can be made good through means of that security. Debts of the former class are called privileged.

These are, 1. *Funeral expenses*, suitable to the position and presumed fortune of the deceased, including mournings to the widow and those of the children who resided in family

with the deceased.[1] It is questioned whether a wife's funeral expenses are preferable over her husband's estate.[2] Where the wife possessed separate funds, it was decided that the expense was not a privileged debt against the husband's estate.[3] It is the opinion of the legal authorities in general that the expense of a sumptuous funeral is not privileged where the deceased is bankrupt, and that those who undertake one must look to the credit of their employers.[4]

2. *Medical expenses* connected with the deathbed illness, including the price of medicines and physician's fees.[5]

3. *The current year's rent* of the house in which the deceased has died;[6] a privilege which, owing to the exercise of the landlord's hypothec (*see above*, p. 352), is not likely to be much made use of.

4. *Servants' wages* for the period current at the death or bankruptcy.[7] The privilege has been held in general to apply only to farm and domestic servants, not to overseers, clerks, and working tradesmen.[8] Where the duties of the individual were to take charge of a garden, to assist in sowing and reaping part of a field, and to drive a cart to the market-town with vegetables for the family, the court found the debt privileged in the special circumstances, without deciding whether a gardener's wages are within the privilege.[9]

5. *Friendly Society.*—The money of a friendly society established under the statutes, in the hands of an office-bearer, is in the position of a privileged debt; the person administering the office-bearer's property as executor, trustee, &c., is bound, within forty days after demand in writing, to pay such money out of the debtor's effects "before any other of his debts are paid or satisfied;" and the effects continue bound for the payment. Such money is not properly a debt of the office-bearer, but property in his custody which may be taken out of it; and the statutory declaration, that the circumstance of its being mixed up with the debtor's own property will not alter the ownership, will undoubtedly make the claim of a society preferable to any other privilege.[10]

6. *Ministers' Widows' Fund.*—The rates made payable by the ministers' widows' fund act are declared by statute to

---

[1] E. iii. 9, 43.—[2] B. C. ii. 157.—[3] Auchinleck *v.* Dinmuir's Executors, 19th February 1697, M. 11834.—[4] B. C. ii. 156.—[5] E. iii. 9, 43.—[6] Ibid.—[7] Ibid.—[8] B. C. ii. 158. Maben *v.* Perkins, 3d June 1837.—[9] M'Lean *v.* Shireffs, 21st January 1832. See the Law of Bankruptcy, &c. 3.—[10] 4 & 5 Wm. IV. c. 40, § 12.

be privileged debts, "and preferable to all other debts of the said ministers, heads, principals, and masters, not only upon their benefices and salaries respectively, but also upon their whole personal estate.[1]

7. *The Crown.*—There is a preference in favour of the crown for arrears of assessed taxes. It only covers one year's duties, and, in relation to these, it affects all "moveable goods or effects whatever" of the debtor; and they remain liable though "taken by virtue of any arrestment, poinding, sequestration, or diligence whatever, or by virtue of any assignation on any account or pretence whatever."[2]

SECT. 2.—*General Rules applicable to Securities.*

Securities may be either Voluntary, where the debtor agrees to give his creditor that benefit, or Judicial, where the creditor, through execution for debt, has laid an embargo on the debtor's property. They are also divided into Heritable and Moveable, according to the nature of the property to which they apply. There are certain general rules applicable to every description of security.

In rankings at common law, and not under the sequestration statute, a creditor who holds any part of the debtor's property by any possessory right of security, such as lien or pledge, retains his security absolutely for what remains, though a portion of the debt be paid. A creditor who has obtained a collateral security for his debt, personal or real, retains it in the same manner absolutely for every portion of the debt.

Such a creditor, if he should fail to obtain full payment of his debt after exhausting his security, may, in a general ranking of creditors, rank for the full debt without deducting the payment received through the security, provided that on the whole he draw no more than twenty shillings in the pound. A person who holds separate securities of the above character, on distinct estates, for the same debt, may rank on each estate for the full debt secured on it, to the effect of drawing complete payment of his debt. The rule in these cases is, that a partial payment may diminish the debt but not the security, which is "as broad for the last shilling as for the whole sum."* The rule of ranking under

[1] 19 Geo. III. c. 20, § 19.—[2] 43 Geo. III. c. 150, § 33. See the Ranking of Crown Debts examined, Law of Bankruptcy, &c. 6, 90.—* See the authorities for these principles set forth in the author's Law of Bankruptcy, &c. p. 52-57.

the sequestration act, which will have to be considered further on,* is different.

Double Security—Catholic Creditor.—Where a debt is twice secured on the same estate, the ranking on the second security is only for the balance not paid from the former; but where one debt is secured on different estates, the creditor ranks to the full extent of his debt on each, to the extent of obtaining full payment.[1] Where there are several securities covering greater and smaller portions of the property, the manner in which the more extensive right is given effect to may have a considerable influence on the availability of the more restricted rights. Thus, there may be a security over two estates, and a posterior security in the hands of another creditor over one of them: in such a case it is ruled that the holder of the double security is not capriciously to rank on the estate covered by the secondary creditor's security, to his prejudice, but must first rank on the other estate, or at least assign his security over it.[2] On a similar principle, were there a restricted creditor on each estate, the holder of the double security would not be entitled to spare the one to the prejudice of the other.[3]

SECT. 3.—*Order of Securities on the Moveable Estate.*

Of those debts which are preferable by reason of their securities, and over the subjects secured, the principal in moveables is the crown's debt secured by Writ of Extent, which covers the whole of the moveable property not affected by other real securities. The crown has by statute other securities over commodities for the duties payable on them: Excise duties are secured over "All goods and commodities for or in respect of which any duty of excise is or shall by law be imposed, and all materials and preparations from which any such goods are made, and all stills, backs, vats, coppers, cisterns, tables, presses, machines and machinery, vessels, utensils, implements, and articles for making or manufacturing or producing any such goods or commodities, or preparing any materials, or by which the trade or business, in respect of which the duty is or shall be imposed, shall have been or shall be carried on."[4] When goods are landed in docks under the warehousing act, they continue subject to the lien for freight, and

---

* See p. 382, *et seq.*—[1] B. C. ii. 522.—[2] Kemp's Trustees *v.* Ure, 15th January 1822. See Moray *v.* Mansfield, 4th June 1836.—[3] B. C. ii. 524.—[4] 4 & 5 Vict. c. 20, § 24.

the directors or proprietors of the docks are bound, on receiving notice, to hold them for the benefit of the party to whom freight is due until he is paid, or the amount claimed deposited.[1]

Farther special information as to securities over moveables will be found under these heads,—Arrestment,* Poinding,† Lien,‡ Pledge,§ Hypothec,‖ and the various rights over ship, freight, and cargo, by the navigation laws.¶

All Arrestments and Poindings** used within sixty days before, or within four calendar months after the notour bankruptcy of the debtor, rank on a par.[2] If the first or any other arrester have in the mean time obtained a decree of Forthcoming, by which he has recovered payment, he is bound to communicate their proportions of the fund raised to those who have an equal preference with him in terms of the act, " after allowing out of the fund the expense of making it effectual." Arrestments after the four months do not compete with prior ones, but rank among each other according to their priority.[3] In the case of a poinding, " every other creditor of the bankrupt having liquidated grounds of debt, or decrees for payment, and summoning such poinder, or judicially producing the same in any process or competition relative to the goods or price thereof, before the said four months are elapsed, shall be entitled to a proportional share of the price of the goods so poinded effeiring to his debt, deducting always the expense of such poinding." Poindings after the lapse of the four months rank according to their priority.[4]

SECT. 4.—*Order of Securities on the Heritable Estate.*

Competing Heritable Securities.—The first in order among the securities over the heritable estate is the superior's right to feu-duties;†† the next, burdens by reservation;‡‡ the next, securities whether voluntary (such as heritable bonds),§§ or judicial (such as adjudications),‖‖ on which infeftment has been taken, in the order of the recording of the sasines.[5]¶¶ All adjudications within year and day of the first effectual adjudication are on a level. This rule has created some

---

[1] 8 & 9 Vict. c. 91, § 51.—* See below, Part XIV. Chap. VI. Sect. 5.—† Ibid. § 1.—‡ See above, p. 346.— § See above, p. 345.— ‖ See above, p. 351.—¶ See above, p. 269, *et seq.*—** See below, Part XIV. Chap. VI.—[2] 54 Geo. III. c. 137, §§ 2, 5.—[3] Ibid. § 2.—[4] Ibid. § 5.—†† See above, p. 52.—‡‡ See above, p. 343.—§§ See above, p. 339.—‖‖ See Part XIV. Chap. VII.—[5] B. C. ii. 508.—¶¶ See above, p. 55.

difficulty, because a voluntary security, such as an heritable bond, may intervene between two such adjudications, which ought not to affect the first adjudication, and should not itself be affected by the second. The method of ranking laid down by the authorities in such a case is this: The prior adjudger to be ranked first, the holder of the voluntary security second, and the posterior adjudger third, thus putting the holder of the voluntary security in the situation in which he would have been had he been followed by no second adjudger. The adjudgers are then to be put upon a par according to the statute, by the second adjudger obtaining from the other the difference between what that other has drawn by being ranked first, and what he would have drawn had both been ranked together, and had there been no intervening voluntary security.[1] By this method it will be observed that in the simple case supposed, if the voluntary security is equal to or exceeds the amount first adjudged for, the first adjudger will not have to communicate any part of the sum he ranks for to the second, as it is no more than what he would have received ranking on a par with the second, had the voluntary security been out of the field; and that, if in such circumstances there is no surplus after paying the first adjudger and the holder of the security, the second adjudger will get nothing. It sometimes happens that where there is more than one adjudger, and a holder of a voluntary security, one of the adjudgers may have recorded inhibition* previous to the date of the voluntary security. The inhibition strikes at the voluntary security, but not at an adjudication for debt contracted before the date of the inhibition. If the inhibiter were ranked first, the holder of the voluntary security second, and the simple adjudger last, the effect would be that the inhibition, instead of striking at the voluntary security, would affect the adjudging creditor. The method adopted has been, in the first place, to rank the several parties as if there were no inhibition, and then to give the inhibiting adjudger a right to draw from the holder of the voluntary security so much as will make up the sum which he would have drawn had that security not existed.[2] An inhibition does not annul a voluntary security or any other deed, but merely excludes its effect in so far as it may prejudice the inhibitor's right; consequently, where there had been more than one voluntary

[1] E. ii. 12, 32. B. C. ii. 510.—* See Part XIV. Chap. VII.—[2] B. C. ii. 514.

security in circumstances like the above, the inhibitor was entitled to begin with the last in date, and draw from them backward in succession, until he recovered so much as would make his dividend what it would have been had there been no voluntary security.[1] The inhibitor can neither be benefited nor injured by a subsequent voluntary security, and thus if the voluntary security be followed by adjudications, the inhibitor only draws so much as he would have been entitled to had there been no subsequent voluntary security, but not what he would have been able to draw had there also been no adjudication.[2]

SECT. 5.—*Compensating and Joint and Cross Obligations.*

Compensation, or set-off, takes place where two parties are mutually in the position of debtor and creditor to one another, and it has the effect of extinguishing their debts to the extent to which their amounts are common. The debts must be distinct liquid sums, and *due*. There is no compensation between a past debt and a future or contingent obligation.[3] It is observed by Erskine, that compensation only takes place when the cross debts are of the same species, and that it may be "receivable in quantities of corns, or other fungibles, provided the fungibles be of the same good quality, *e. g.* two quantities of wheat of equally good growths."[4] But, practically, the operation of compensation is confined to debts. Debts cannot compensate each other where the bankruptcy of one of the parties intervenes between the contraction of the debts;[5] nor can a right of compensation be created within the sixty days before bankruptcy. (*See below*, p. 368.) As to questions of compensation in transactions with companies, *see below*, p. 364.

Cautionry.—A cautioner who pays the debt he has guaranteed may rank for it on the principal debtor's estate.[6] If a cautioner fail before the principal debtor has been discussed, the creditor may rank on his estate for a contingent debt.[7] Where the cautioner and the principal have failed, the creditor is, at common law, entitled to rank for the full debt on each estate, to the effect of drawing payment, but no more.[8] The practice seems to be different in England, where a creditor having received part-payment from one party can only rank for the balance on the estate of an-

[1] Lithgow *v.* Armstrong's Creditors, 10th January 1747, M. 2896.—[2] Gordon *v.* Campbell, App. 2d August 1842. 1 Bell, 563.—[3] E. iii. 4, 14, 15.—[4] Ibid. 15.—[5] B. C. ii. 129.—[6] B. C. i. 348.—[7] Ibid. 350.—[8] Ibid.

other.[1] There can be no double claim on the estate for the same debt, either by the original debtor or a person holding through him; and so a cautioner, who has not paid the debt he has guaranteed, can only claim as a contingent creditor for a dividend to be set apart to meet his claim when he shall have paid the debt. If the creditor is paid a dividend, and receives the remainder from the cautioner, the same effect will be produced, and the cautioner will not be entitled to rank.[2] As to like cases in Sequestrations, *see below*, p. 384.

Bills.—The principles of cautionry and joint obligation will hold in bills of exchange. Each party who appears on the bill however is liable in full to the holder, who can thus rank on each estate for the whole amount, to the effect of getting complete payment of his debt.[3] But see the rule in Sequestrations as set forth below. In cases of cross bills compensation and cautionry are often mixed up with each other, and the extrication of the just principle of ranking is difficult and complicated. The following general principles appear to be established in this complicated species of ranking.

"*Mutual Accommodation, and one Party Bankrupt.*—When parties have accepted bills for each other's accommodation, and one of the parties becomes bankrupt, the solvent party having to pay both sets of bills, can only rank on the other party for the acceptances of that party, and cannot rank for the bills accepted by himself for the other party's accommodation.

"*Several Obligants, and all Bankrupt.*—Where there are obligants each jointly liable for the whole debt, and all are bankrupt, the creditor may rank on each estate to the full extent of his debt, to the effect of drawing from the whole of them the full debt and no more; but the one bankrupt estate has not, in such circumstances, a right to rank upon any of the others for what it may have paid, for this would be, in effect, a double ranking for one debt. When there are bills or notes which have passed between two sets of parties, and they become both bankrupt, such of the bills or notes as are in the hands of *bonâ fide* holders for value, rank on both estates, the right of the holders not being affected by any questions between the estates, arising out of the one having obtained more accommodation than the other.

"*Exchanged Acceptances.*—Acceptances, notes, or other descriptions of negotiable paper, may be exchanged. In case

[1] Henley's B. L. 155.—[2] B. C. ii. 527.—[3] Th 748.

of the bankruptcy of the parties, *bonâ fide* onerous holders will rank on all the estates whose names appear as obligants on such paper. In England it is held that each bankrupt estate may prove against the other on such paper, but only to have a dividend set apart to be paid when that other is relieved of any liabilities it may be under for the paper it received in return for that which it gave. No rule on this subject has been clearly established in Scotland.

"*Deposited Bills.*—If a creditor holding in deposit separate bills by third parties, covering separate parts of a debt, should fail to recover from the several obligants on these bills the whole of his debt, he may rank for the whole amount on the estate of the principal obligant, to the effect of drawing the balance unpaid in dividends."*

It must be kept in view in all cases of counter-ranking, that no inequality in the respective dividends can affect the claims of the estates upon each other, a dividend standing in every case in place of the full sum due.

SECT. 6.—*Ranking on the Estates of Companies and Partners.*

In England, on the bankruptcy of a company and of the partners, the estate of the company and the estates of the respective partners are kept separate. The estate of the company must meet the debts of the partnership creditors before the creditors of the partners can claim; and, in like manner, the estate of each partner is liable in the first place for his particular debts, and it is only in the case of a surplus that those of the company can rank.[1] In Scotland, the company's estate is, in the first place, exclusively set aside for the creditors of the company (those of the individual partners having a claim only in case of a surplus), and, on there not being sufficient funds to meet their claims, they are entitled to rank for their respective balances on the estates of the partners.[2]† Where a company has engaged with any other company, or with an individual, in a joint adventure, the creditors of the joint adventure will be entitled to have any funds belonging to it in the hands of the company kept apart for themselves. In such a case the creditors will have their first claim on the funds of the joint adventure. They will

---

* See the Law of Bankruptcy, &c., 26-50, where the authorities and illustrations are set forth.—[1] Smith's M. L. 602.—[2] B. C. ii. 660. Dunlop, &c. *v.* Spiers, &c. 4th July 1776. M. 44610.—† See below, p. 384.

then rank for the balance on the funds of the company with the other creditors of the company, and finally rank for the remaining balance on the estates of the partners along with their individual creditors.[1] Where one of two partners retiring, the other carried on business in the name of the firm, it was found that there could be no separate ranking against him as a firm and as an individual.[2] It is a general rule that in cases of bankruptcy, transactions with a company and transactions with individual partners, cannot be pleaded against each other as compensation by the company or its creditors. Thus it is held that the debt of a partner cannot be pleaded as compensation of a debt due to the company by his creditor. On the other hand, however, it is said that a company perfectly solvent may make an arrangement by which one of its partners may take the burden of a debt due by the company, and so entitle the company to plead compensation.[3]

SECT. 7.—*Ranking of Deceased's Creditors against his Representatives.*

A debt which is specifically a burden on the heritable estate of the deceased must be paid from the heritage. A moveable debt, or any simple debt not specially fixed on the heritage, is a burden on the executry,* the heir to the heritable property being liable if the moveable property be insufficient to meet it. There are various classes of heirs to the heritable property, the one being liable on the failure of another. The heir of line is first liable, then the heir of conquest, and lastly, the heir of provision.† If one of these be specially burdened with the debt he is liable in the first place.[4] Where one of the next of kin, or any other successor to the moveable property, pays an heritable debt, or the heir of the heritage pays a moveable debt, or any heir pays a debt for which he is not primarily responsible, he has recourse against the heir who is so.[5] As to the order in which legatees are liable, *see above*, p. 110. The executor may pay the privileged debts, as above described (*see* p. 356), without judicial sanction. He cannot pay unprivileged debtors till the expiry of six months after the death of the debtor, and all who cite the executor within that time are on a par.‡ The creditors of the defunct using diligence within

[1] B. C. ii. 661.—[2] Reid *v.* Chalmers, 10th July 1828.—[3] B. C. ii. 664.—* See above, p. 104.—† Ibid. p. 90, *et seq.*—[4] E. iii. 8, 52.—[5] Ibid.—‡ See this discussed above, p. 115.

year and day after the debtor's decease are preferable to the creditors of the next of kin succeeding to him.[1]

The apparent heir in heritage is allowed a year and day to deliberate whether or not he shall adopt the succession with the burdens to which his ancestor may have subjected it.[2] As a converse of this privilege, no deed by the heir executed within the year is effectual to convey or burden the estate to the prejudice of his ancestor's creditors.[3] The act embraces every description of alienation, whether gratuitous or onerous.[4] By the same statute it is provided, that all creditors of the deceased who do diligence against the real estate within three years after the death of the deceased, are preferable to those of the heir. Sequestration is a completed diligence for all concerned, which will secure the preference of the creditors of the ancestor during the three years, without their requiring to adopt special proceedings.*

Heir Three Years in Possession.—If a person has been three years in possession of an estate as heir apparent, or without having made up regular titles (*see above*, p. 101), his successor, who serves heir, not to him, but to his ancestor who was last infeft in the property, becomes answerable for his debts to the amount of the succession, having recourse upon his executors or other representatives, who may be primarily liable as above. If several heirs apparent have been thus successively in possession, each for three years, the next heir who serves becomes liable for the debts of all. Before the debts of the heir apparent can be paid from the estate, those of the person to whom the heir who is entering serves, and those of the heir entering, must first be paid.[5]

For sequestration of the estate of a deceased debtor, *see below*, p. 376.

CHAPTER II.

Simple Insolvency and Notour Bankruptcy.

Sect. 1.—*Introductory Notice.*

In England the word bankruptcy is generally used to express the process analogous to the sequestration law of Scotland,

[1] 1695, c. 41.—[2] E. iii. 8, 54.—[3] 1661, c. 24.—[4] E. iii. 8, 102.—* See Law of Bankruptcy, &c., 112.—[5] 1695, c. 24. E. iii. 8, 94. S. H. S. ii. 68, *et seq.*

by which the whole available funds of an insolvent trader are realized and divided among his creditors. The simple word bankrupt, however, applies more properly to the position in which the debtor has placed himself before such a process can commence. A man must commit, or suffer to be committed against him, one of those acts indicative of inability or unwillingness to meet his obligations, termed "Acts of Bankruptcy" (and which bear a generic resemblance to those coinciding events, which with us constitute notour bankruptcy), before the process can commence; and until his situation is so taken advantage of, his position in the eye of the law is not altered. Among those who cannot pay their debts then, the English law acknowledges two classes, bankrupts, or those whose estates, if they be mercantile people, are liable to distribution under the bankrupt statutes, and insolvents.* In Scotland, without much practical distinction, there is a more enlarged nomenclature. The debtors unable to meet their engagements may be divided into three orders, Insolvents, Bankrupts, and individuals whose estates are under Sequestration.

SECT. 2.—*Insolvency.*

Simple Insolvents are, properly speaking, those whose funds will not meet their debts; but it is not to be inferred because the balance in a tradesman's books is against him, that his affairs are irretrievably embarrassed; and the law looks to some indication of his inability to meet, either by his property or his resources, the current demands on him, such as his allowing his bills to be dishonoured, or compounding with his creditors.[1] Insolvency does not like bankruptcy place the debtor in a new legal character as a member of society; but it has a material effect over the contracts on which he may have entered during its continuance. Thus, it entitles a creditor to stop goods sold and not paid for, *in transitu*,† it entitles creditors to interfere with the debtor's disposal of his property to their prejudice,‡ and it is a matter for consideration in taking those ulterior steps which convert the debtor into a legal bankrupt.

SECT. 3.—*Bankruptcy.*

A person insolvent becomes bankrupt by being imprisoned

* As to whom, see below, p. 374.—[1] B. C. ii. 163.—† See above, p. 164.—‡ See below, p. 368.

on horning and caption, or on a warrant according to the new form,* or, when such a writ of imprisonment is issued against him—by seeking the sanctuary as a protection, fleeing, or absconding, or forcibly defending his person;[1] or, if he be residing in the sanctuary, or abroad, or privileged, or have a personal protection,† by a charge of horning, or a charge on an extract in terms of the late act, executed against him, together with either an arrestment not loosed within fifteen days, or a poinding or an adjudication.‡[2] A person whose estate is sequestrated is a bankrupt from the date of the first deliverance in the petition for sequestration.§[3] Imprisonment on an act of warding, or on a *meditatio fugæ* warrant,‖ will not form an ingredient in notour bankruptcy.[4]

All classes of persons, married women excepted, may become bankrupt under some one or other of these provisions. It is a matter of question how far a married woman trading on her own account may become bankrupt.[5]

For the effects of bankruptcy on the deeds of the bankrupt, *see below*, p. 371. For its effects in equalizing diligence, *see Part* XIV.

SECT. 4.—*Gratuitous and Fraudulent Deeds by Insolvents.*

The protection which the law gives to creditors from attempts on the part of insolvent debtors to make over their property to relations, or fraudulently to place it at the disposal of their personal friends, is founded on a statute of the reign of James VI., and the decisions through which it is interpreted. In terms of the act the law declares "all alienations, dispositions, assignations, and translations whatsoever made by the debtor of any of his lands, teinds, reversions, actions, debts, or goods whatsoever to any *conjunct* or *confident* person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contraction of lawful debts from true creditors, to have been from the beginning, and to be in all time coming, null and of non avail, force, nor effect, at the instance of the true and just creditor, by way of action, exception, or reply, without farther declarator." For the protection of individuals who may have fairly purchased the property of the debtor

---

* See below, Part XIV. Chap. V.—[1] 1696, c. 5. 1 & 2 Vict. c. 114, § 35.—† See Part XIV. Chap. V. § 6.—‡ See as to the different kinds of diligence below, Part XIV.—[2] 54 Geo. III. c. 137, § 1. 1 & 2 Vict. c. 114, § 35.—§ See below, p. 379.—[3] 2 & 3 Vict. c. 41, § 25.—‖ See Part XIV. Chap. V.—[4] B. C. ii. 169.—[5] Ibid. 166.

from any one to whom it has been so transferred, it is farther enacted that "In case of any of his Majesty's good subjects, no way partaker of the said frauds, have lawfully purchased any of the saids bankrupt's lands or goods by true bargains, for just and competent prices, or in satisfaction of their lawful debts from the interposed person, trusted by the saids dyvours; in that case, the right lawfully acquired by him who is nowise partaker of the fraud, shall not be annulled in manner foresaid, but the receiver of the price of the saids lands, goods, and others from the buyer, shall be holden and obliged to make the same forthcoming to the behoof of the bankrupt's true creditors in payment of their lawful debts."[1]

In the interpretation of this act it is held, that where a debtor who is insolvent is found to have granted such a gratuitous deed as that condemned by the act, after the debt incurred to the creditor pursuing reduction of it, the insolvency must be presumed to have had existence at the date of the deed, but it is capable of being disproved by evidence of solvency.[2] The term "conjunct persons" applies to near relations. It has been held to extend to uncles, step-sons, and brothers-in-law, but not to uncles-in-law or nephews-in-law.[3] The only definition of "confident persons" is that it embraces those connected in business with the debtor, *e. g.* partners, clerks, agents, &c.[4]

The conveyances struck at are such as are gratuitous. Where they are not to relations for whom the granter may be under an obligation more or less strong to provide, there will seldom be any difficulty in discovering whether they are onerous and fair, or not; and the chief impediments to the clear interpretation of the act have occurred in cases of family settlements. Where one of the parties to a marriage receives a provision from a relation of the other party, the transaction is held to be onerous, the marriage being the consideration.[5]* A future marriage is, in the general case, an onerous consideration, and so, reasonable provisions in an antenuptial contract will not be reducible by the husband's creditors.[6] "But, onerous as those rights are, the court will, on the challenge of prior creditors, reduce even an antenuptial provision to a wife granted after insolvency, if it be exorbitant, or if the husband was known to be insolvent."[7] A deed after marriage in implement of an obligation in an antenuptial contract is in a similar position; but in volun-

[1] 1621, c. 18.— [2] B. C. ii. 183, 193.—[3] Ibid. 187. E. iv. 1, 31. Sir George M'Kenzie on the act 1621, 22.—[4] Ibid.—[5] Blackburn *v.* Oliver, 29th May 1816.—* See above, p. 21.—[6] E. iv. 1, 33.—[7] B. C. ii. 188, 189.

tary provisions after marriage, for which the other party is not presumed to give a consideration, a stricter rule is followed, which limits a provision to the wife to such as may be alimentary.[1] * Gratuitous provisions granted to children after the father has contracted debts are in all cases struck at by the statute.[2]

The creditor who reduces a gratuitous deed achieves no particular advantage to himself over the other creditors, he merely removes a claim or encumbrance on the estate of the insolvent, leaving it open to the diligence of the creditors at large.[3]

SECT. 5.—*Fraudulent Preferences under Act* 1621.

By another branch of the act it is provided that if "any of the said dyvours, or their interposed partakers of their fraud, shall make any voluntary payment or right to any person in defraud of the lawful and more timely diligence of another creditor, having served inhibition, or used horning, arrestment, comprising, or other lawful mean duly to affect the dyvour's lands, or goods, or price thereof to his behoof; in that case, the said dyvour or interposed person shall be holden to make the same forthcoming to the creditor, having used his first lawful diligence, who shall likewise be preferred to the con-creditor, who, being posterior to him in diligence, hath obtained payment by the partial favour of the debtor or of his interposed confidant; and shall have good action to recover from the said creditor that which was voluntarily paid in defraud of the pursuer's diligence."[4]

The person entitled to proceed in a reduction in terms of the act, is one who has taken certain steps which would end in an attachment of the property, so conveyed to another creditor. If the property be moveable he must have done diligence affecting the moveables, as poinding or arrestment; if it be heritable, the diligence must be such as will attach that species of property, as inhibition or adjudication.[5] In the former case, it would appear that a charge either on letters of horning, or in the new form,† will be a sufficient progress in the diligence of poinding.[6] Payments of prior creditors in cash are not challengeable by the act as interpreted in decisions, nor are bargains and sales in the regular

---

[1] B. C. i. 642; ii. 190.—* See above, p. 26.—[2] E. iv. 1, 34.—[3] B. C. ii. 196. See commentary on the act 1621, in "The Law of Bankruptcy," &c., p. 142, *et seq.*—[4] 1621, c. 18.—[5] E. iv. 1, 39. B. C. ii. 200.—† See Part XIV. Chap. V.—[6] E. iv. 1, 39. 1 & 2 Vict. c. 114, § 35.

course of business, though for the disposal of the subject towards which the creditor's diligence points.[1] Deeds which the debtor is legally bound to grant are not struck at.[2] The insolvency of the granter at the time of granting the preference, is necessary to a reduction on this as on the other branch of the act.*

SECT. 6.—*Fraudulent Preferences under the Act* 1696.

The bankruptcy act of 1696 (*see above*, p. 367), "declares all and whatsoever voluntary dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly, by the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of his creditor, either for his satisfaction, or farther security, in preference to other creditors, to be void and null."[3] The interpretation of the court has confined the right of challenge to those who were creditors at the date of the deed challenged.[4]

This act strikes at all conveyances of, and securities over heritable property, to a creditor within the excluded period, as well as to the transference of any moveable article of merchandise or other property, either directly, or by the transmission of a bill of lading or other negotiable title.

Money.—Payments in cash of debts due at the time of payment, are not affected by the act; and under the head of cash are included bank-notes and drafts on bankers.

Bill Transactions.—In the case of a debtor and creditor living in the same place, if the debtor indorse to the creditor a bill, not as part of a series of transactions which stand against each other in a current account, but as a distinct provision for a specific debt, the transaction will come within the act.

The transmission to a creditor of an acceptance by a third party, avowedly to provide for a debt which the debtor admits that he cannot otherwise meet, and of which the creditor wishes direct payment, is struck at.

The replacement of bills indorsed but not accepted, by bills accepted in consideration of a separate security granted to the acceptor by the debtor, is a transaction struck at by the act.

When, in the course of transactions between a commercial

---

[1] B. C. ii. 201.—[2] Ibid. 202.—* See the Law of Bankruptcy, &c., p. 160.—[3] 1696, c. 5.—[4] B. C. ii. 208.

man and his bankers or agents, in which he is in the practice of transferring to them negotiable instruments, to be discounted and credited, or to lie over till they come to maturity, paper of this description happens to be transmitted within the sixty days, it is not struck at by the act.

In transactions with bankers, in which bills or drafts are discounted, or in which money is deposited, within the sixty days, the question whether this was done in the usual course of business, or for the purpose of giving a preference, is a question of fact which, if disputed, and if the transaction do not bear its character on its face, must go to a jury.

The circumstance that the debt which it is intended to meet is not due at the time of the transaction, will bring a preference of any kind by transference, security, indorsement, or payment of money, within the act. Thus, when a bill was given in payment of two instalments of a bond, the one due, the other not, the transaction was held good as to the former, as to which it was a payment, but bad as to the latter, as to which it was a security.[1]

If a merchant sell goods to a creditor so that he may plead compensation as against the debt, the transaction is reducible, but not if it be made by public roup in the ordinary course of business.

A security which, though it be but an acknowledgment of a debt justly due, places the creditor in a better position than he could place himself in by legal diligence, comes under the act; and so does an acknowledgment of a debt enlarging its amount, and thereby enabling the creditor to obtain a greater dividend than he would otherwise receive.

Intention of Parties.—The material subject of inquiry being, whether or not the transference, security, &c., was made for the purpose of constituting a preference,—it is not relevant to inquire whether the receiver was acquainted with the state of the debtor's affairs, or had any reason to anticipate his early bankruptcy.

On the other hand, it will not make an intentional preference, by the debtor, valid, that the original debt, which it was intended to meet, was constituted without the creditor's consent or knowledge; and thus it would appear that wherever a debt has been incurred by fraudulent appropriation, an attempt to make restitution within the sixty days is struck at by the act.*

[1] Pattison *v.* Allan & Co., 3d December 1828.—* See the authorities for these principles stated and examined in the author's Law of Bankruptcy, &c., p. 208-232.

The act does not strike at the completion by infeftment (*see above*, p. 55) of heritable securities for money borrowed, granted at the time of the advance; and it is held "that wherever there is stipulated a *specific security* over a particular subject, in consideration or on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the act.[1]

Infeftment.—In the case of dispositions, heritable bonds, and other rights "whereupon infeftment may follow," the date of the deed is taken to be the date of the recording of the sasine.[2]

Intimation and Delivery.—Dispositions, assignations, and venditions, which do not require sasine, but to which intimation and delivery are requisite, in order to render them complete as transferences or as securities, "are, for the purposes of the act, to be reckoned to be of the date of the intimation, delivery, or other act requisite for completing the same."[3]

Assignation of Lease.—An assignation of a lease, where the tenant has the right to assign, completed by actual possession, does not require, in questions with creditors, intimation to the landlord; and the date of the actual possession will mark the completion of the transaction.[4]

CHAPTER III.

MERCANTILE SEQUESTRATION.

SECT. 1.—*Introduction.*

THE object of the sequestration law is, on the occasion of a man engaged in trade becoming bankrupt (*see above*, p. 367), to reduce his whole available means to a common fund for division among his ordinary creditors, after those who have preferable claims (*see above*, p. 356, *et seq.*) are satisfied. It

---

[1] B. C. ii. 256.—[2] 1696, c. 5. 54 Geo. III. c. 137, § 12. 2 & 3 Vict. c. 41, § 25.—[3] 54 Geo. III. c. 137, § 13. 2 & 3 Vict. c. 41, § 25.—[4] See the Law of Bankruptcy, &c., p. 236.

has the effect of uniting the zeal and activity of the creditors on the one common point of turning the bankrupt's estate to the best account, instead of leaving them each to exert himself for his own individual advantage at the expense of the claims of others, and the interest of the creditors as a body.

It is a peculiarity of all systems of mercantile bankruptcy, and distinguishes them from the arrangements for the distribution of the estates of other insolvents, that when the conduct of the bankrupt has been upright, and he has conformed with the statute, he is discharged of all his debts. The merchant's difficulties are generally occasioned by unsuccessful speculations, and as his creditors are in a great measure participators in his career, by allowing him to incur obligations to them which they know he can only meet by successful trading, it is thought unjust that he should bear for ever the burden of his misfortunes, while it is contrary to the interest of the public that he should be deprived of inducements to energy and enterprise. The non-trader, however, who runs in debt, with but a few exceptions, deliberately exceeds his income. His hopes of future fortune will generally arise from the chances of succession, and it would be unjust that his creditors should, by his obtaining an absolute discharge, be precluded from any share in his good fortune. Hence it is a general feature of measures for distributing the estates of those who are not traders, whether in England or Scotland, that though they may be released from immediate legal enforcement, they are not discharged from their debts.

Various sequestration acts have from time to time been passed for Scotland, after the example of the bankruptcy statutes of England. The last, 2 & 3 Vict. c. 41, came into operation on 28th August 1839. This statute does not affect proceedings in sequestrations commenced before the time when it thus became effectual, and these must be concluded in terms of the old statute 54 Geo. III. c. 137.

The chief Bankrupt Statute of England is the 6 Geo. IV. c. 16; amended by 1 & 2 Wm. IV. c. 56, and the 5 & 6 Vict. c. 122. The principal point in which the English law differed from that of Scotland, was formerly in a special commission being issued for the conducting of each bankruptcy. By the two last-mentioned acts this system has been materially altered. The "Commission" is superseded by a "Fiat" issued from the Court of Bankruptcy, — a new tribunal erected by the acts,—authorizing the petitioning creditor to prosecute his complaint in the Court of Bankruptcy. The most remarkable feature in the new system,

however, is in the appointment of official assignees. They are chosen by the lord chancellor from among commercial men of a certain standing, and they are members of the Court of Bankruptcy. They are to act in concert with the "Chosen Assignees" or Trustees, whose duty it is to suggest all suitable means for realizing and distributing the estate under the direction of the creditors. Over the measures so adopted, with the approbation of the creditors, the official assignee in a bankruptcy has no direct control. All the proceedings are, however, conducted under his eye, and he may check any fraudulent attempts on the part of the chosen assignee; while he is at the same time the person in whom all the bankrupt's property is vested. The act 1 & 2 Wm. IV. only brought bankruptcies within a certain area round London under the authority of the Bankruptcy Court. By the 5 & 6 Vict. c. 122, the system was extended to Country Bankruptcies, an establishment of bankruptcy courts, with official assignees, having been made uniform over all the country. A bankruptcy code similar to that of England was extended to Ireland by 6 & 7 Wm. IV. c. 14.

It has been considered that this plan is calculated to give the creditors all the advantages derivable from the impartiality of official management, without neutralizing the zeal and energy that characterize the efforts of individuals when their personal interest is at stake. In 1844, some alterations were made on the English Bankruptcy system, one of which was the passing of an act for winding up the affairs of bankrupt Joint Stock Companies, noticed above (p. 193).

SECT. 2.—*Persons against whose Estates Sequestration may be awarded.*

The description of persons liable to sequestration under the act is as follows:—Any debtor "who is, or has been, a Merchant, Trader, Manufacturer, Banker, Broker, Warehouseman, Wharfinger, Underwriter, Artificer, Packer, Builder, Carpenter, Shipwright, Innkeeper, Hotel-keeper, Stable-keeper, Coach-contractor, Cattle-dealer, Grain-dealer, Coal-dealer, Fish-dealer, Lime-burner, Dyer, Printer, Bleacher, Fuller, Calenderer, and generally any debtor who seeks, or has sought his living, or a material part thereof, for himself, or in partnership with another, or as agent or factor for others, by using the trade of merchandise, by way of bargain, exchange, barter, commission or consignment, or by buying and selling, or by buying and letting for hire, or by the

workmanship or manufacture of goods or commodities." No one can be sequestrated as a "holder of stock in any of the public or national funds, or of India stock, or as a partner in any company incorporated or established by act of Parliament, or by charter, or as a landholder or farmer, unless such landholder or farmer be *bonâ fide* a dealer in cattle not the produce of, nor grazed, nor worked on his farm, or unless he be a dealer in grain not the produce thereof" (§ 5).

Where Debtor applies.—In the case where the debtor consents and applies for sequestration, with the statutory concurrence, the only requisite besides that of his coming within one of the classes of traders above set forth is, that he be personally "subject to the laws of Scotland." It is not necessary that he should have been made bankrupt, or that he has had a domicile in Scotland, or that his business has been conducted in Scotland (§ 5).

Bankruptcy, &c.—The debtor (unless he consent to the sequestration) must be bankrupt (*see above*, p. 367), must have carried on business within Scotland, and must have also, within a year before the date of presenting the petition, resided, or had a dwelling-house or place of business in Scotland (§ 5).

Sanctuary.—A debtor within the above definition may be sequestrated though he be not bankrupt, if he have been in the sanctuary for sixty days, either continuously or not, within the space of twelve months (§ 7).

A company carrying on business as above may be sequestrated, provided (unless the company consent) that one of the partners has been made bankrupt for a company debt, and the company have carried on business in Scotland, and a partner have had a dwelling-house or the company a place of business in Scotland within a year and day before the presentation of the petition (§ 6).

Deceased Debtor.—Sequestration may be awarded of the property of "*any* deceased debtor who at the time of his death resided, or had a dwelling-house, or carried on business in Scotland, and was at that time owner of heritable or moveable estates in Scotland;" but not until the expiry of six months after his death, unless he had granted a mandate to apply for sequestration, or was bankrupt when he died, or had remained in sanctuary for sixty days, at some time or other within the twelve months preceding his death, "or unless his successors shall concur in the petition or renounce the succession" (§ 4). It has been held that such sequestration may take place though the deceased died before the

passing of the act, and thus it is not necessary to show that he was insolvent.*

Extent of Trading requisite.—Between the classes of persons whose specific pursuits are given in the enumerated list, and those who are subsequently described in the general clause applicable to one who seeks his living for himself, or as an agent or factor, " by using the trade of merchandise, by way of bargain, exchange, barter, commission, or consignment," &c., a distinction has been established. In the former class of cases, when the bankrupt comes within the definition, by embarking as a shareholder in any of the adventures enumerated, he may be sequestrated, however disproportionate his interest in it may be to his other pecuniary transactions. Under the general clause, no one comes within the act unless he " seeks or has sought his living, or a material part thereof, for himself, or in partnership with another," by the adventure.† In England (where the qualification, " his living, or a material part thereof," is not employed, but where the spirit of the law has tended to the same effect) it is said, " In order to constitute a *trading*, the *quantum* of actual dealing is immaterial, provided it be carried on with the intent of dealing generally, *ex. gr.*, of supplying any one who will come to buy. I say of dealing *generally*, for a person is not a *trader* by such *occasional* acts as a schoolmaster's selling books to his own scholars, or a person who has bought more of an article than he wants, selling the surplus." [1] It is also held in England that " where the executor of a trader only disposes of his testator's stock, it will not constitute him a trader, even though he buy ingredients to make it marketable; but if the executor increase the stock and continue to sell, he becomes a trader." [2]

SECT. 3.—*Applications for Sequestration, Awarding, Procedure for rendering effectual, and Recall.*

Sequestration may be awarded on the application of the debtor, with concurrence of creditors, or at the instance of creditors alone. In the former case, a petition signed by the debtor, or a mandate by him authorizing the petition, must be produced (§§ 5, 6). Those creditors entitled to petition, or to concur in a debtor's petition are, any one creditor whose

* See the Law of Bankruptcy, &c., p. 277-279.—† See the authorities in the Law of Bankruptcy, &c., p. 271.—[1] Smith's M. L. 523-4.—[2] Henley's B. L. 5.

debt amounts to £50, any two whose debts together amount to £70, or any three or more whose debts together amount to £100. The debts need not be liquid, but they must not be contingent (§ 8). As to the manner in which the creditors qualify themselves to petition, *see below*, p. 381.

Application for sequestration is made by petition to the Lord Ordinary, signed by the petitioner or his counsel. In the case of a petition without consent of the debtor, it must be presented within four months after the bankruptcy, "or, in case of retiring to the sanctuary, within four months after the expiration of the said sixty days." The Division of the court to which it is appropriated may be marked upon the petition, the petitioning or concurring creditor producing with it his oath, accounts and vouchers (§§ 8, 12). (*See below*, p. 382.)

In the case of a deceased debtor, "the petitioning creditor shall in his oath, or in a separate oath, specify the place where the debtor resided, or had a dwelling-house, or carried on business in Scotland at the time of his death, and whether he was then owner of estates in Scotland; and where the petition is presented during the life of the debtor, or for sequestration of the estates of a company, without the consent of the debtor or company, the petitioning creditor shall in such oath swear that he believes the debtor or company, as the case may be, to be within one or other of the said descriptions [viz., of persons whose estates may be sequestrated], and he shall specify which description, or that he believes the debtor to have retired and remained within the sanctuary, as herein before provided" (§ 12).

Where the application is with consent of the debtor, the Lord Ordinary may forthwith issue a deliverance awarding sequestration from its date. He appoints a meeting to be held at a specified day and hour, not earlier than eight or later than fourteen days from the date of the deliverance, within the county where the debtor carries on, or last carried on business (failing which, within the county where he resides or last resided), to elect an interim factor; and another meeting not less than four weeks and not more than six weeks from the date of the deliverance, at the same place, to elect a trustee or trustees in succession, and commissioners, &c. A remit is made to the sheriff, and protection is granted to the debtor against arrest or imprisonment for civil debt until the meeting for election of trustee (§ 13).

In the case of a deceased debtor, warrant is granted to cite his successor personally (or if he be abroad, or his residence

be unknown edictally, and also at the house where the debtor last resided, or had his place of business in Scotland), on inducise of twenty-one days,* to appear against the sequestration. If no appearance be made, the Lord Ordinary orders intimation in the Edinburgh Gazette, requiring the successor to appear within a further space of twenty-one days. If no cause against it be shown, sequestration is awarded, and the other orders are issued as above; any successor who has made up a title to, or is in possession of the estate, being ordained to transfer it to the trustee. Diligence may be obtained to recover evidence to show that the debtor resided or carried on business in, and was owner of property in Scotland at the time of his death, and was bankrupt, or had been in sanctuary. The petitioning creditor may also, after execution of citation, and before sequestration is awarded, apply by written note for the appointment of a judicial factor to administer the estate in the mean time. No creditor, after the date of the first order or deliverance, can be confirmed executor-creditor, or proceed with diligence against the estate of the deceased (§ 14).

Where the petition is without the debtor's consent, the Lord Ordinary grants warrant to cite him to appear at a specified period. If he be within Scotland, the day fixed for appearance must be not less than six, or more than twenty-one days from the date of citation, which must be accomplished by delivering to him personally, or by leaving at his dwelling-house or place of business, a copy of the petition and warrant. If the debtor be furth of Scotland, the day fixed for his appearance must be not less than thirty, or more than forty days from the date of citation, which must be accomplished by leaving a copy of the petition and warrant at the dwelling-house or place of business last occupied by him, and another at the office of edictal citations. In either case, the warrant charges him to appear and show cause why sequestration should not be awarded. "The Lord Ordinary shall, if desired, grant diligence to recover evidence of the notour bankruptcy, and of the debtor being within the requisite description, or of his having retired to, and remained within the sanctuary as aforesaid." On production of the return of the citation, and of the evidence of those facts as to the bankruptcy, &c., for which diligence may be obtained, the Lord Ordinary awards sequestration, at the expiration of the time specified in the warrant: 1*st*, If the

* See Part XIV. Chap. V.

debtor do not appear personally, or by counsel, or by an agent; 2*d*, If appearing, he do not pay, or produce written evidence of his having paid or satisfied, not only the debts on which he had been made notour bankrupt, or had taken refuge in the sanctuary, but the debts due to the petitioners, and those due to any other creditors, appearing and concurring in the petition; 3*d*, If he do not show cause why sequestration should not be awarded. In the deliverance meetings are appointed and protection granted as above (§ 15).

In the case of a company it is sufficient that the citation be at their last place of business, if a partner, or clerk, or servant be there, or otherwise at the dwelling-house of any acting partner, and if that cannot be found, at the office of edictal citations. The sequestration may be of the estates of the company and partners jointly, or of their respective estates separately (§ 16).

Recording and Publication.—The party applying for sequestration, before expiry of the second lawful day after the first deliverance of the court, must present an abbreviate of the petition and deliverance, signed by him or his agent, to be recorded in the register of inhibitions. The record has the effect of an inhibition, and of a citation in an adjudication of the estate of the debtor, at the instance of the creditors afterwards ranked on the estate; "and it shall not be competent to stop such effect, or the effect of the sequestration after it is awarded, by paying the debt or debts in respect of which it was applied for or awarded; and if the said abbreviate be not so recorded, it shall have no effect as an inhibition or citation as aforesaid."* The party must also insert a notice, in the form prescribed by the act, within four days from the date of the deliverance, in the Edinburgh, and within eight days, in the London Gazette. It is not necessary to insert any other notice, under the act, in the London Gazette (§ 20).

Commencement of the Sequestration.—In all questions under the act the date of the first deliverance or order of the Lord Ordinary on the petition presented to him is held to be the date of the sequestration (§ 24).

Bankruptcy.—The awarding of sequestration has the effect of bankruptcy from the date of the first deliverance, without prejudice to any previous bankruptcy (§ 25). (*See above*, p. 367.)

---

* See as to Inhibitions Part XIV. Chap. VII.

Recall.—The deliverance awarding sequestration is not liable to review, but it may be recalled at the instance of the debtor or his successor—if the debtor have not consented, or of a creditor, on a petition to the Lord Ordinary, presented within forty days. When, in the case of a deceased debtor, his successor has been edictally cited, the petition may be presented at any time before publication of the advertisement for payment of the first dividend. The petition must set forth reasons for recall. The Lord Ordinary orders a copy of the petition and his deliverance to be served on each petitioning creditor, or on the petitioning debtor and concurring creditor, as the case may be, or on the known agent of such parties, and on the interim-factor, or the trustee, if such have been appointed, requiring them to answer within a specified short time, ordering a notice of the presenting of the petition to be published in the Edinburgh Gazette. On the expiration of the time fixed, the Lord Ordinary proceeds to pronounce judgment. If he recall the sequestration, the recall is to be entered in the register of sequestrations and on the margin of the register of inhibitions. Until the sequestration be recalled, proceedings go on as if no petition had been presented (§ 21).

Nine-tenths of the creditors in number and value may at *any time* apply for recall, notice being given to all concerned, by advertisement of the Lord Ordinary's deliverance in the Gazette, to appear within fourteen days, at the expiration of which judgment is pronounced (§ 22). Under the old act, the court was not in use to grant recall, unless there were an irregularity in the proceedings, or all the creditors consented.[1]

SECT. 4.—*The Creditors as a Body: their Affidavits, Qualifications, Meetings, Votes, &c.*

The claims on which creditors may qualify themselves to vote and act, are those which existed at the time of the first deliverance, in the form of debts against the bankrupt, present, future, or contingent, according to the ordinary rules of law, subject to such exceptions and restrictions as are provided for in the statute (§§ 31, 32).

Affidavit.—To entitle a creditor within the United Kingdom to petition or concur, or to vote, or to draw a dividend, he must produce, either with the petition for sequestration,

[1] Kid *v.* Rose, 12th February 1830. B. C. ii. 333.

or at a meeting of the creditors, or in the hands of the trustee, an oath, taken by him before a sheriff, magistrate, or justice, to the verity of his debt, stating in his oath what other persons (if any) are, besides the bankrupt, liable for any part of the debt, and any security he may hold over the estate of the bankrupt or of other obligants, and stating that he has no other obligants or securities besides those specified. Where he holds no other person than the bankrupt so bound, and no security, he must depone to that effect. "In cases where the creditor is a body corporate, an oath of verity made as aforesaid by the manager, cashier, secretary, clerk, or other principal officer of such body corporate, shall be sufficient, although the person making the same be not a partner in such corporation; or in case of a company, an oath by a partner shall be sufficient" (§ 9). A creditor abroad must make his affidavit before a magistrate of the country where he resides (he being certified to be a magistrate by a notary, or a British minister or consul), or otherwise the creditor's known agent may make an oath of credulity, or of his conscientious belief in the existence of the debt. In the case of a creditor being under age, a similar oath of credulity may be taken by his agent, factor, guardian, or manager (§ 10). The creditor having qualified will be entitled to give his vote (subject to after-scrutiny), however unsound his claim may be.[1]

Separate Oaths.—When a claimant is a creditor in more than one debt, he may produce a separate oath on each debt due to him; and every oath which he so makes is valid, if it be in terms of the statute.[2]

Vouchers.—The creditor must produce, with his oath, such accounts and vouchers as may be necessary to prove his debt; "but if not in possession thereof previously to the period hereinafter assigned for lodging claims with a view to a share in any dividend, he shall state in his oath the cause why the said accounts and vouchers are not produced, and in whose hands, to the best of his knowledge, the same are, which oath shall entitle him to have a dividend set apart till a reasonable time be afforded for production thereof, or for otherwise establishing his debt according to law; but he shall not be entitled to act or vote till such production be made, or the debt established as aforesaid; and the interim-factor or trustee shall, on production of the oaths

[1] Blyth *v.* Baird, 8th July 1825.—[2] Wilson *v.* Drummond, 21st Dec. 1844. See the Law of Bankruptcy, &c., p. 149.

and grounds of debt, mark the same with his initials, and make an entry thereof in the sederunt-book, and of the date when the same were produced, and, if required, he shall return to the creditor the grounds of debt" (§ 11).

If a creditor, who has petitioned or concurred, or who has opposed a sequestration, withdraw, or become bankrupt, or die, any other may be sisted in his place, and may follow out proceedings (§ 23).

A mandatory of a creditor, exhibiting a written mandate, may vote in his stead (§ 30).

No person acquiring a debt after the sequestration, except by succession or marriage, can vote in the election of interim-factor, trustee, or commissioner, but such a person may be reckoned a creditor in all other respects (§ 31).

Interest.—" If a creditor claim for a debt with bygone interest, he may in his oath accumulate the interest as at the date of the sequestration, and he shall specify the amount of the interest, and also of the accumulated sum, but he shall not be entitled to claim on the estate for interest either on the principal debt or on such accumulated sum after the date of the sequestration; and if a creditor claim for a debt which is not payable till after the date of the sequestration, he shall in his oath deduct the legal interest thereon from the date of the sequestration to the time of payment, and specify the balance; and if he claim for a debt which, by the usage of trade, is liable to a discount of more than legal interest, he shall in his oath state the amount of such discount, and deduct it from the debt, and specify the balance; provided that if such debt be not payable at the date of the sequestration, he shall also deduct from such balance the legal interest as aforesaid, and specify the balance." The creditor can vote for the balance only (§ 32). (*See below as to Ranking for Dividend*, p. 403.)

Security.—If a creditor hold a security over the estate, " he shall, before voting, make an oath, in which he shall put a specified value on such security, and deduct such value from his debt, and specify the balance: and if the estate [on which he holds the security] be sold, he shall specify in his oath the free proceeds which he has received or shall be entitled to receive therefrom, and specify the balance due after deduction thereof; and he shall be entitled in either case to vote in respect of such balance and no more, without prejudice to the amount of his debt in other respects: and in questions as to the disposal or management of the estate subject to his security, he shall be en-

titled to vote as a creditor for the whole amount of his debt, without making any such deduction" (§ 33).

Co-obligant.—" Where a creditor has an obligant bound with, but liable in relief to the bankrupt, or holds any security from an obligant liable in relief to the bankrupt, or any security from which the bankrupt has a right of relief, such creditor shall, before voting, make an oath, in which he shall put a specified value on the obligation of such obligant, and on such security, to the extent to which the bankrupt is entitled to relief, and he shall deduct such value from his debt, and specify the balance; and he shall be entitled to vote in respect of such balance and no more, without prejudice to the amount of his debt in other respects" (§ 34).

Companies.—" A creditor on the estate of a company shall not be bound, for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners; but if he claim on the estate of a partner, he shall, before voting, in his oath, put a specified value on his claim against the estate of the company, and also against the other partners thereof, in so far as they are liable to relieve such partner, and deduct such value from his debt, and specify the balance; and he shall be entitled to vote as a creditor for the said balance, and no more, without prejudice to the amount of his debt in other respects" (§ 35). (*See above*, p. 364.)

A Contingent Creditor cannot vote, unless the trustee, or, if the trustee be not elected, the Sheriff, put a value on his debt. If the contingency take place before the valuation, the creditor may vote to the full extent of the debt. The judgment of the trustee or Sheriff is subject to review at the instance of any creditor who has claimed. When the Sheriff is applied to, to make the valuation, notice must be given to the interim-factor, or, if he be not elected, to the petitioning or concurring creditor (§ 39). A similar procedure is adopted in valuing an *annuity*, " regard being had to the original price given for the said annuity" (§ 40). As to cautioners for annuities, *see below*, p. 404.

Meetings, Votes.—The trustee or any commissioner may at any time call a meeting, and the trustee is bound to call a meeting whenever he is required by one-fourth in value of the creditors ranked (§ 74). Meetings appointed by the act are held on notice of the day, hour, place, and purpose, advertised fourteen days before in the Edinburgh Gazette (except in case of the meeting for electing an interim-factor),

and any meeting may be adjourned to the following day (§ 75). No notification is to be sent to creditors who direct none to be sent, or to creditors for less than £20, unless they give directions in writing to send them notice (§ 76). Unless where there is an express provision otherwise, questions at meetings of creditors are fixed by the majority in value of those present; "and where, for the purpose of voting, the creditors are required to be counted in number, no creditor, whose debt is under £20, shall be reckoned in number, but his debt shall be computed in value" (§ 44). It is provided that "the word 'vote' shall, as well as the ordinary meaning thereof, include a consent to any offer of composition and to a discharge of the debtor, and also a dissent from such offer or discharge, and generally any act as a creditor" (§ 3).

SECT. 5.—*Election and Confirmation of Interim-Factor and Trustee.*

Meetings.—The meetings held on the days fixed as above (p. 378), may be adjourned by the creditors present, provided they be not postponed beyond the limits above stated. The sheriff-clerk transmits to the meeting for the election of interim-factor the certified copy of the petition for sequestration, and deliverances on it. If two or more creditors give notice, the sheriff or his ordinary substitute (or in case of necessary absence, a sheriff-substitute authorized for the occasion) must attend the meeting, and adjourned meetings, and preside. Where the meeting is presided over by a sheriff, the sheriff-clerk or his deputy must attend, and mark the oaths and productions with his initials, and write the minutes in presence of the meeting, entering the names and designations of the creditors and mandataries present, the amount for which they claim, and other circumstances which the sheriff (who signs the minutes) may judge fit. He retains the oaths (being liable to exhibit them on demand) till the election is determined, when he delivers them to the interim-factor or trustee, as the case may be. If no sheriff is present, the creditors elect a preses and a clerk, both proceeding as above. In either case those who have been entered in the minutes as qualified, proceed to elect an Interim-Factor or Trustee, as the case may be, "or two or more trustees to act in succession in case of non-acceptance, death, resignation, removal, or disqualification; and in the case of the sequestration of the estates of a company and of

the partners, one interim-factor, and (as the case may be) one trustee for all the estates, or separate interim-factors or (as the case may be) separate trustees on the estates of the company, and on the estates of all or each of the individual partners, and trustees in succession as aforesaid: And it shall not be lawful to elect as interim-factor or trustee the bankrupt, or any person conjunct and confident with the bankrupt, or who holds an interest opposed to the general interest of the creditors, or whose residence is not within the jurisdiction of the Court of Session" (§ 45). Under an old act it has been generally looked on as a necessary qualification that the trustee should reside in the same place with the bankrupt, but the rule was subject to be modified by the position and circumstances of the estate.[1]

If the sheriff or his ordinary substitute be present, and there be no competition for the office to be filled, or objections stated, he declares the person chosen to be interim-factor or trustee, as the case may be. If there be objections to votes or candidates, they must be stated at the meeting, when the sheriff may either forthwith decide on them, or reserve them for consideration. If necessary he may take notes of objections and answers, and within four days after the meeting, decide on hearing parties *vivâ voce*, stating the grounds of his decision in a note (§ 46).

Where the preses is a sheriff only appointed for the occasion, or a chairman elected by the creditors,—whether there be any competition or objection or not, he must forthwith report the proceedings to the sheriff or his substitute; the oaths meanwhile, if the sheriff-clerk or his depute be present, remaining in his possession, or, if he be not present, being transmitted to him by the preses, to be delivered to the interim-factor or trustee when finally appointed. If there be no competition or objection, the sheriff then declares the result. If there be competition or objection, the parties, within four days from the meeting, must lodge objections, which are considered as above. The decision declaring the election of an interim-factor is final, and not subject to review in any court or in any manner whatever (§ 47).

Security.—The creditors at these meetings fix a sum for which the interim-factor or trustee is to find security, and decide on the sufficiency of the caution offered. The sheriff-clerk provides bonds to be subscribed by the interim-factor or trustee, and cautioners (§ 48).

[1] Spence *v.* Eadie, 2d December 1826. Forester *v.* Mackenzie, 17th February 1831.

Appeal.—An appeal against the judgment of the sheriff, declaring a party duly elected, may be taken to the Court of Session. It may be taken at the instance of any creditor or competitor who gives notice in writing to the sheriff-clerk within two days after the date of the deliverance. In the case of a competition, the appellant must lodge with the note of appeal a bond of caution signed by a cautioner approved of by the meeting, as above.

The note of appeal must be lodged with, and marked by the clerk to the bills within fourteen days after the date of the deliverance; and along with it there must be lodged a certificate from the sheriff-clerk of the due deliverance of notice, and the lodging of the bond of caution. On a copy of the note of appeal, certified by one of the bill-chamber clerks, being delivered to the sheriff-clerk, he is to transmit to the bill-chamber "the minutes of election, together with such of the proceedings as may be required." The appeal is to the Inner-House during session, and to the Lord Ordinary on the bills during vacation. When the appeal is taken to the Lord Ordinary during vacation, if the court should resume its sittings before it is disposed of, the proceeding goes to the Inner-House. If the question be decided by the Lord Ordinary, it may be reviewed by the Inner-House on reclaiming note, in the same manner as the other decisions of the Lord Ordinary under the act are reviewed (§ 54).

Effect of the Judgment.—The court, on pronouncing judgment, may order a new election, and appoint a time and place for that purpose. If an appealing competitor is preferred, a remit is made to the sheriff to confirm him. An appeal does not stop proceedings in the sequestration. (§§ 54, 55, 128.)

Confirmation.—On the bond for the interim-factor being lodged, the sheriff confirms his election without appeal. If there have been no appeal as to the election of a trustee, or on an appeal being disposed of, the trustee is in the same manner finally confirmed. The interim-factor or trustee receives an act and warrant from the sheriff-clerk, of which he must immediately transmit a copy to the bill-chamber for entry in the register of sequestrations. A copy of the act and warrant, certified by the bill-chamber clerk, is evidence of the title of the interim-factor or trustee, and will enable him to sue in all courts within the British dominions (§ 49).

At the meeting for electing a trustee, commissioners are elected, and the interim-factor's remuneration may be fixed. (*See below*, pp. 388, 389.)

SECT. 6.—*Powers and Duties of the Interim-Factor or Sheriff-Clerk.*

If the creditors fail to elect an interim-factor, or the nomination otherwise fail, his duties, as below specified, devolve on the sheriff-clerk (§ 50). They are as follows:—He must immediately take the steps necessary for the preservation of the estate until the meeting for election of trustee. He must "take possession of and recover the bankrupt's estate, and his title-deeds, books, bills, vouchers, and all other documents whatsoever, so far as then known, and make an inventory thereof," a copy of which he must transmit to the bill-chamber. He must lodge all monies in bank in the same manner as the trustee (*see below*, p. 390), and pay to the petitioning or concurring creditor, out of the first funds realized, the expense occasioned by the necessary procedure (§ 51). The factor must keep a sederunt-book, and engross in it abstracts of the state and rental provided to him by the bankrupt (§ 52). (*See below*, p. 394.)

At the meeting to elect a trustee the factor must exhibit the sederunt-book, "and also an account of his intromissions and disbursements, and if required by any creditor, the books of the bankrupt, with the title-deeds, bills, vouchers, and other documents, conform to inventory;" and if the meeting be satisfied that he has duly lodged all monies and performed his duties, they are to fix his remuneration, to be paid with his advances out of the funds in his hands. If he be dissatisfied with the sums allowed, the amount is to be determined by the sheriff, but he is not entitled in respect of non-payment, or on any other ground, to retain any part of the estate, which he must deliver with all vouchers, the state and rental, and other documents, to the trustee, who, if sufficient funds have not been realized by the factor, is to pay him out of the first realized funds (§ 53). The creditors may at any meeting (which the trustee must call if required) make an allowance to the interim-factor, subject to review. He may obtain, by application to the Lord Ordinary or the Sheriff, an order for the opening of the bankrupt's letters (§ 97). If an appeal be pending as to the election of a trustee, the factor is to continue to act till a trustee be confirmed (§ 55). The factor is amenable for his conduct to the Lord Ordinary and the Sheriff (§ 64). (*See below*, p. 392.) He is, along with the trustee and commissioners, statutorily precluded from purchasing any part of the bankrupt estate (§ 99).

SECT. 7.—*The Commissioners.*

At the meeting for electing the trustee (*see above*, p. 385), and after he is chosen, three commissioners are to be elected in the same manner. They must be either creditors or mandataries. They are not bound to find security. The sheriff decides who are the persons duly elected, and declares their election by a deliverance in the sederunt book, which entitles them to act without further confirmation. A majority forms a quorum. No person is eligible as a commissioner who is disqualified to be a trustee. (*See above*, p. 386.) Any mandatary elected a commissioner loses that office on written intimation by his constituent to the trustee that the mandate is recalled, and the trustee must immediately record the intimation in the sederunt-book. The trustee must in all cases where a commissioner has ceased to act, call a meeting of creditors to elect a new one (§ 56).

"The commissioners shall superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, examine the acts and intromissions of the trustee, audit his accounts, decide as to paying or postponing payment of a dividend, fix his remuneration, and may assemble at any time to ascertain the situation of the bankrupt estate; and any one of them may make such report as he may think proper to a general meeting of the creditors" (§ 57).

The commissioners hold a meeting within fourteen days after expiry of six months from the date of the sequestration, to examine into the proceedings of the trustee, and audit his accounts, &c., when they declare what part of the net produce of the estate, after a reasonable deduction for future expenses, shall be divided among the creditors (§ 103). (*See below*, p. 403.)

The manner in which the commissioners must exercise their powers is more particularly considered under the heads applicable to the various steps in the sequestration.

SECT. 8.—*Powers and Duties of the Trustee.*

The trustee within twenty-one days after his confirmation, must present an Abbreviate in the form prescribed by the act, to be recorded in the register of Adjudications, and certified by the keeper (§ 60). "The trustee shall manage,

realize, and recover the estate belonging to the bankrupt wherever situated, and convert the same into money, according to the directions given by the creditors at any meeting, and if no such directions are given, he shall do so with the advice of the commissioners; and he as well as the interim-factor or sheriff-clerk acting as factor, shall lodge all money which he may receive in such bank as four-fifths of the creditors in number and value at any general meeting shall appoint;" and failing such appointment, in the Bank of Scotland, the Royal Bank, the bank of the British Linen Company, the Commercial Bank, or the National Bank,—provided the bank be not one in which he is an acting partner, manager, or cashier. The money must be lodged by him "in his official character" under the act, "at the highest rate of interest which can be procured for the same." The bank must once yearly balance the account, and accumulate the interest with the principal sum, so that both bear interest, on failure to do so being liable to account as if the money had been so accumulated (§ 61). If the interim-factor, or trustee, keep in his hands more than £50 belonging to the estate for more than ten days, he must pay to the creditors at the rate of £20 per cent. per annum on the excess, for such time as it may be in his hands beyond the ten days; and unless the money has been kept from innocent causes he will be dismissed, on petition to the Lord Ordinary by any creditor, being liable to expenses, and having no claim for remuneration (§ 62). The trustee must reimburse the petitioning creditor if the interim-factor have not received sufficient funds (§ 51).

Sederunt-Book.—"The trustee shall keep a sederunt-book, in which he shall record all minutes of creditors and of commissioners, states of accounts, reports, and all the proceedings necessary to give a correct view of the management of the estate; and he shall also keep regular accounts of the affairs of the estate, and transmit to the bill-chamber clerk before each of the periods herein assigned for payment of a dividend, a copy, certified by himself, of such accounts, and such copies shall be preserved in the office of the said clerk; and the said sederunt-book and accounts shall be patent to the commissioners, and to the creditors or their agents at all times: Provided always, that where any document is of a confidential nature (such as the opinion of counsel in regard to any matter affecting the interests of the creditors on the estate), the trustee shall not be bound to

insert it in the sederunt-book, or to exhibit it to any other person than the commissioners, unless he be ordered by competent authority to do so" (§ 63).

Within eight days after his confirmation, the trustee must apply to the sheriff to name a day for the bankrupt's public examination. On the warrant being granted, the trustee must intimate by advertisement in the Edinburgh Gazette his name and designation, his election as trustee, and the time and place of the examination. He must likewise intimate a day and hour for a meeting of the creditors, which must be not less than fourteen, or more than twenty-one days after the day of examination, or (in the case of a deceased debtor) after the trustee's confirmation (§ 65). Within fourteen days after the examination the trustee must prepare a report as to the position of the estate, and an estimate of what it may produce, to be presented to the meeting, where he must be prepared to give all explanations (§ 73).

Resignation and Removal.—A majority in number and value of the creditors at any meeting called through the Edinburgh Gazette at least fourteen days previously, by advertisement specifying the purpose of the meeting, may remove the trustee or accept of his resignation. The removal is absolutely vested in such a majority, and they are not bound to show any cause,* "and one-fourth of the creditors in value may at any time apply by petition to the Lord Ordinary for removal of the trustee; and the Lord Ordinary shall order the said petition to be served on the trustee, and intimated in the Edinburgh Gazette; and if the Lord Ordinary shall be satisfied that sufficient reason has been shown, he shall remove the trustee, and appoint a meeting of the creditors to be held for devolving the estate on the trustee next in succession, or electing a new trustee; and if the trustee shall die, resign, or be removed, or remain at any one time for three months furth of Scotland, any commissioner, or any creditor ranked, or claiming and entitled to be ranked, on the estate, may apply to the sheriff for an order to hold a meeting for devolving the estate on the next trustee in succession, or electing a new trustee, and the sheriff shall grant warrant to hold such a meeting at a certain time and place, which shall be advertised in the Edinburgh Gazette by the commissioner or creditor so applying." If it be found necessary to elect a new trustee, the proceedings are the same as those in the election of the previous one (§ 77).

* See Law of Bankruptcy, &c., p. 597.

Independently of his liability to removal by a majority, or at the instance of one-fourth in value, as above, the trustee is amenable to the Lord Ordinary, and to the Sheriff to whom the sequestration has been remitted, to account for his intromissions and management "at the instance of any party interested." The proceeding is by petition served on the trustee, and thenceforward according to the procedure in appeals against deliverances of the trustee (§§ 54, 127).

The vesting of the estate in the trustee, his duties in recovering and converting it into money, his adjudication on claims, and the manner in which he must pay the dividends, are respectively considered below.

State, and Auditing Accounts.—Immediately on the expiration of six months from the date of the sequestration, the trustee must make up a state of the whole estate, of the funds recovered, and of the funds outstanding (stating why they have not been recovered), "and of his intromissions, and generally of his management." The commissioners at their meeting within fourteen days after the expiration of the six months, examine the state, "and ascertain whether the trustee has lodged the monies recovered by him in bank or not; and if he has failed to do so, they shall debit him with a sum at the rate of twenty pounds on every hundred pounds not so lodged, and so after that rate on any larger or smaller sum, being not less than fifty pounds." They certify under their hands in the sederunt-book, the balance due to or by the trustee in his account with the estate as at the expiration of the six months, and declare whether any and what dividend is to be made (§ 103). Before a composition (*see below*, p. 407) is approved of, the trustee's accounts must be audited by the commissioners, and the balance due to him fixed, and paid or provided for, subject to review by the Sheriff or Lord Ordinary (§ 117).

Every trustee must, on the 31st October yearly, deliver free of expense to the sheriff-clerk a return, in the form appointed by the act, of every sequestration in which he is trustee. The sheriff-clerks must transmit these returns to the bill-chamber clerks, who are to make them up in a record according to the alphabetical order of counties, open to all concerned. A trustee failing to make return is removable from his office at the instance of any one creditor, or subject to such censure as the Lord Ordinary may think suitable, and liable to expenses (§ 133). The trustee is disqualified from purchasing any part of the bankrupt estate (§ 99).

Trustee's Commission.—When the Sequestration is not

wound up by composition contract, the trustee's remuneration or commission is fixed, in the first place, by the commissioners, at their meetings for auditing the accounts, when they authorize him to take credit for it in his accounts with the estate. If the trustee be discontented with the amount, or, if any creditors think it excessive, its sufficiency may, after having been brought before a meeting of the creditors, be adjudicated on by the Court of Session or the Sheriff (§ 103). Before a deliverance approving of a composition is pronounced, the commissioners must fix the trustee's remuneration; and it must be paid or provided for to the satisfaction of the trustee and commissioners before the deliverance is pronounced. The decision of the commissioners is, in this case, directly subject to review by the Lord Ordinary or the Sheriff, at the instance of the trustee, the bankrupt, or any of the creditors, provided the appeal be brought before the deliverance declaring the sequestration at an end is pronounced (§ 117).

Discharge.—After a final division of the funds, the trustee must call a meeting of the creditors on twenty-one days' notice, by advertisement in the Edinburgh Gazette, specifying the time, place, and purpose of the meeting, and by letters addressed by post to the creditors, to consider an application for his discharge. He must lay before the meeting the sederunt-book and accounts, with a list of unclaimed dividends. The creditors may then declare their opinion of his conduct, and he may apply to the Lord Ordinary or the Sheriff, who may hear creditors, and pronounce or refuse decree of exoneration and discharge. If the discharge be pronounced by the sheriff, an extract is transmitted to the bill-chamber for confirmation by the Lord Ordinary, whose decree to that effect is entered in the register of sequestrations, and the bond of caution for the trustee is delivered up (§ 134). Before his discharge the trustee must transmit the sederunt-book to the bill-chamber clerks, who will intimate to him the bank in which unclaimed dividends are to be lodged (§ 135). (*See below*, p. 409.)

SECT. 9.—*The Bankrupt, his Personal Protection, Allowance, Examination, and Discharge.*

Liberation and Protection.—The Lord Ordinary may, on the bankrupt's application, either in the petition for sequestration or separately, grant warrant of liberation, after hearing objections, &c. If the application be refused, the bank-

rupt may petition a second time with consent of the trustee and commissioners (§ 17). A warrant of protection or liberation is effectual in all parts of the British dominions, except against a warrant to imprison *meditatione fugæ*,* or for compelling performance of an obligation, or for a criminal act (§ 18). At the meeting for election of the trustee, and at the meeting after the examination of the bankrupt, or at any meeting called for the purpose, a majority in number and value may authorize the trustee to apply to the sheriff for a renewal, for such time as they may think fit, of the personal protection (§ 58).

Allowance.—Four-fifths in value of the creditors present at such a meeting, may vote an allowance to the bankrupt, or to the individual partners of a bankrupt company, until the period for payment of the second dividend. It is not to exceed £3, 3s. per week (§ 59). Under the old act the allowance has been looked upon as a remuneration to the bankrupt for assistance given to the creditors in ascertaining and realizing his estate; and if he refused to give assistance, or found an income in any other employment, it was generally withheld.[1]

Proceedings are not to be stopped by the death of the bankrupt during their dependence (§ 23).

State of Affairs.—The bankrupt must, before the time appointed for the election of trustee, make up, subscribe, and deliver to the interim-factor a state of his affairs, "specifying his whole estate, wherever situated, the estates in expectancy, or to which he may have an eventual right, the names and designations of his creditors and debtors, and the debts due by and to him, and a rental of his heritable subjects." He must give every information and assistance necessary to enable the factor or trustee to execute his duty; and if he fail to do so, or to grant any requisite deed, application may be made to the sheriff to compel him to do so, under penalty of imprisonment and forfeiture of the benefits of the act (§ 52). At any time before the close of his examination, he may make additions to or alterations on his state, and when it is completed it is subscribed by him and the sheriff (§ 72).

Examination.—On the application of the trustee, within eight days after his confirmation as above (p. 387), the sheriff issues his warrant to the bankrupt to attend in the sheriff court or elsewhere, at a specified time, not less than

* See Part. XIV. Chap. V. Sect. 7.—[1] B. C. ii. 435. D. P. 648.

fourteen or more than twenty-one days from the date of the warrant (§ 65). The sheriff may grant warrant to apprehend the bankrupt, and bring him from prison or the sanctuary, the warrant in such case acting as a personal protection. Such warrants are effectual in all parts of Scotland. If necessary the sheriff may grant a commission to take the examination. The sheriff may, on the trustee's application, direct as many examinations as he thinks fit, and the examinations may, at the discretion of the sheriff or commissioner, be on oath (§ 66). If the bankrupt be in England or Ireland, warrant by the Lord Ordinary, under the seal of the Court of Session, will be authority for apprehending him, and bringing him up for examination whether he be in custody or at large (§ 67).

Examination of Family, Clerks, &c.—The sheriff may at any time, on application of the trustee, order "examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others who can give information relative to his estate, either by declaration or on oath, as to the sheriff shall seem fit;" and if they do not appear when duly summoned on a warrant, he may issue warrant to apprehend them. Where such person, however, is not one of the bankrupt's family, nor his clerk or servant, eight days must intervene between the summons and the warrant to apprehend, unless the trustee on oath specify a reasonable cause of belief that such person intends to leave the country to avoid the examination. The warrants may be used in any part of Scotland. If a person cannot conveniently attend, the sheriff may grant Commission to take his examination, and the examination, whether by the sheriff or by a commissioner, may be adjourned, if it seem fit, to an early time to be then fixed (§ 68).

The bankrupt and others, as above, must answer all lawful questions relating to the affairs of the bankrupt; and the sheriff may order production of any books, papers, deeds, or other documents in their custody relative to the bankrupt's affairs, and cause them, or copies of them, to be delivered to the trustee. Persons other than the bankrupt are entitled to the allowances of witnesses, the amount, if disputed, being fixed by the sheriff (§ 69). They have also the privileges of witnesses; and although the circumstance, that it may subject them to the admission of a civil obligation, will be, in the general case, no excuse for their failing to answer questions, they are not bound to answer when the effect

might be to criminate themselves. It is not clearly settled how far the bankrupt enjoys this privilege.*

If a party "refuse to be sworn, or to answer, to the satisfaction of the sheriff, any lawful question put to him by the sheriff or trustee, or by any creditor with the sanction of the sheriff; or without lawful cause shall refuse to sign his examination, or to produce books, deeds, or other documents in his custody or power, relating to the estate, the sheriff may grant warrant to commit him to prison, there to remain until he comply with the order; which warrant shall specify the question and answer, book, deed, document, or the refusal to swear or to sign the examination." The warrant is not subject to review; but a petition may be presented to the Lord Ordinary for recall, who will decide, on the petition being served on the trustee, and parties being heard (§ 70).

Latent Partners.—If a latent partner of a bankrupt company do not, by intimation to the interim-factor or trustee, acknowledge that he is a partner, on or before the day appointed for the examination of partners, he loses the privileges of the act, "unless in an application for the same he satisfy the Lord Ordinary that the omission proceeded from innocent mistake, or ignorance of the proceedings, or reasonable misconception as to his liability as a partner, and unless he shall then follow out all necessary steps for remedying, as far as possible, the loss and inconvenience thence arising" (§ 71).

Oath.—The bankrupt's state of his affairs being subscribed by the sheriff and the bankrupt, the latter takes the oath prescribed by the act, which must be engrossed in the sederunt-book, and subscribed as relative to the state. If he be a Quaker, Moravian, or Separatist, or one who having belonged to one of these sects retains an objection to taking an oath, he may take an affirmation (§ 72).

Fraud.—If it appear to a majority in number and value at any meeting that the bankrupt has not made a full and fair surrender, or has in any way acted fraudulently, they may hold a meeting on fourteen days' notice to consider the matter, and may there authorize the trustee to prosecute the bankrupt at the expense of the estate (§ 126).

Discharge.—If every qualified creditor concur, the bankrupt may petition the Lord Ordinary or Sheriff for a discharge at any time after the meeting following his examination.

* See Authorities in the Law of Bankruptcy, &c., p. 525.

He may petition eight months after the date of the sequestration, if a majority in number and four-fifths in value concur. On the petition being, by order of the court, intimated in the Edinburgh Gazette,—if, at the distance of not less than twenty-one days thereafter, and on evidence of concurrence, there be no opposition, a deliverance is pronounced finding the bankrupt entitled to a discharge. If objection be made, the judge, on hearing parties, finds for the discharge, or refuses it, or annexes such conditions to it as may seem fit (§ 122). If the bankrupt be found entitled to his discharge, he must "make a declaration, or, if required by the trustee or any creditor, an oath before the Lord Ordinary or Sheriff, that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction, to obtain the concurrence of any creditor to his discharge." If he be beyond the jurisdiction of the Lord Ordinary or Sheriff, or by lawful cause prevented from appearing, commission may be granted to take the declaration or oath. The Lord Ordinary or the Sheriff, on being satisfied with the oath or declaration, pronounces a discharge of all the debts and obligations for which the bankrupt was liable at the date of the sequestration. When the decision is pronounced by the Sheriff, it is confirmed by the Lord Ordinary. The discharge operates in any part of the British dominions as an acquittance to the bankrupt. An entry of it is made by the bill-chamber clerk in the register of sequestration (§ 123). If the discharge be on a composition (*see below*, p. 407), the declaration or oath disclaims undue means for obtaining concurrence to the offer, and the discharge re-invests the bankrupt in the estate, subject to the claims of the creditors on the composition (§ 116). If the bankrupt be concerned in, or cognizant of any collusive preference to a creditor (*see below*, p. 410), he forfeits his title to a discharge, and the discharge, if it have been granted either on or without an offer of composition, may be annulled on a petition by the trustee, or any creditor, to the Lord Ordinary (§ 125).

Property acquired during Sequestration.—If the bankrupt do not notify to the trustee any property that may fall to him before his discharge, he forfeits all the benefits of the act. He is liable to examination by the trustee as above regarding any such property (§ 81).

Any surplus after payment of the debts, interest, and

expenses of procedure, is payable to the bankrupt or his representatives (§ 136).

The discharge does not necessarily apply to all the estates comprehended in the sequestration; and thus, in the case of the sequestration of a company and partners, the company may be discharged while the partners remain sequestrated; and a discharge may be made applicable to individuals, without embracing their copartners, or the company of which they are members.*

SECT. 10.—*Vesting and Recovery of the Estate, and Competition with other Rights.*

Estate in Scotland.—By the confirmation the moveable property of the debtor, wherever situated, so far as attachable for debt, is held to vest in the trustee from the date of the first deliverance, subject to such preferable securities as are not null or reducible (§ 78); and the whole heritable property is held to vest from the same date, as if the trustee had obtained a recorded adjudication without reversion, and had taken possession by poinding the ground,† subject to such preferable securities as may not be null or reducible (*see above*, p. 360), and to the creditor's right to poind the ground. The sequestration does not affect the rights of the superior, nor any question of succession between the heir and executor of a creditor, nor the rights of the creditors of an ancestor, except that it operates as a completed diligence in their favour. It does not affect entails or other legal limitations (§ 79).

In other Parts of the Empire.—All heritable or real property possessed by the bankrupt in other parts of the British dominions, and the titles by which it is held, vest in the trustee, and where by the law of the place a conveyance requires registration, the confirmation must be registered. No purchase of such property, however, made for a valuable consideration, prior to the registration, and in the purchaser's ignorance of the sequestration, is invalidated (§ 80).

If any property fall to the bankrupt before his discharge, it vests in the trustee as at the date of its acquisition. The trustee, on coming to the knowledge of the fact, must present a petition to the Lord Ordinary, who, on intimation in the

* See Authorities in Law of Bankruptcy, &c., 444, *et seq.*—† See Part XIV. Chap. VI. Sect. 2.

Gazette, and hearing any parties objecting, may declare it so to vest (§ 81).

Preferences.—All preferences and deeds granted by the bankrupt during the sequestration, without consent of the interim-factor or trustee, are void. "But if a *bonâ fide* purchaser is in possession of moveable effects received from the bankrupt after the sequestration, and when ignorant thereof, for a price paid or which he is ready to pay, he shall not be obliged to restore the effects; and if a debtor, when ignorant of the sequestration, have paid his debt *bonâ fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee; and if the possessor of any bill or promissory note, with recourse on other parties, which is payable by the bankrupt, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt, such person shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage" (§ 85).

Heritable rights on which infeftment may follow are, in questions under the act, to be held of the date of the registration of the sasine (*see above*, p. 55), and sales, assignations, and other conveyances which do not require infeftment, but require delivery or intimation to complete them, are held to be of the date of the act so required to complete them (§ 25).

A person claiming any right or subject, improperly included in the sequestration, may recover it on petition to the Lord Ordinary (§ 86).

Sequestration as a Diligence.—The sequestration is equivalent to a general adjudication, and supersedes any special adjudication only made effectual within a year and day before the first deliverance or order by the Lord Ordinary (§ 81). It is equivalent to an arrestment in execution and forthcoming,* and a completed poinding,† superseding all such diligence executed on or after the sixtieth day before the first deliverance. An arrester or poinder, however, so losing the benefit of his diligence, has a preference over the funds for the expense it has occasioned to him (§ 83). The sequestration renders the debtor bankrupt from the date of the first deliverance (§ 25).

As all arrestments and all poindings used within sixty days before notour bankruptcy, and within four calendar months after it, rank *pari passu*; and as a petition for

* See Part XIV. Chap. VI. and VII.—† See Part XIV. Chap. VI.

sequestration, without consent, must be presented within four months after notour bankruptcy, such sequestration will have the effect of equalizing, and sweeping into one general diligence for the benefit of the creditors at large, all arrestments and poindings used on any day subsequently to the sixty-first day before that on which the debtor was made notour bankrupt.*

Poinders of the Ground, &c.—No poinding of the ground not carried into execution by sale, and no decree of maills and duties, on which a charge has not been given, at least sixty days before the sequestration, is available in any question with the interim-factor or trustee; but no creditor who holds a preferable heritable security is thus prevented from executing a poinding or obtaining a decree of maills and duties "available only for the interest on the debt for the current term, and for the arrear of interest for one year immediately before the commencement of such term" (§ 95).

Deceased Debtor.—"Where the sequestration of the estates of a deceased debtor is dated within seven months after his death, any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor, which has not been lawfully completed for a period of more than sixty days before his death, and any confirmation as executor creditor after the debtor's death, shall in these several cases be of no effect in competition with the trustee." The property so affected passes to the trustee, saving the party's right to his expenses as above (§ 84).

Completing Titles.—The bankrupt, if required, must grant any deed necessary for recovering his estate, and feudally vesting it in the trustee. A trustee may complete feudal titles in his own person, and superiors must enter him.† The trustee may validly grant conveyances (§ 87).

Heirs Making up Titles.—"Where sequestration is awarded against the estate of a person after his death, and his successor has made up a title to his heritable estate, the trustee may apply by petition to the Lord Ordinary, praying that such estate shall be transferred to and vested in him: and the Lord Ordinary shall order the petition to be served upon such successor, and require him to answer the same within fourteen days." An abbreviate of the petition and

* See Authorities in the Law of Bankruptcy, &c. p. 307.—† See above, p. 169.

deliverance being recorded in the register of inhibitions has the effect of an inhibition.* If on expiration of the fourteen days no cause is shown to the contrary, the Lord Ordinary declares the estate to be vested in the trustee as at the date of the sequestration, in the same manner as by act and warrant of confirmation, and the trustee within eight days thereafter must cause an abbreviate of the petition and deliverance to be recorded in the register of adjudications† (§ 88).

Trustee's Right to Assignation of Securities.—The trustee and commissioners, within two months after a creditor has voted on an oath, in which he has deducted a security, as also the majority of the creditors (the creditor with the security not being counted) at the meeting where such creditor has voted, may require him to assign his security to the trustee, on payment of the value he has set on it, with 20 per cent. additional. The creditor may correct his value at any time before he is called on so to assign (§ 36).

SECT. 11.—*Disposal of the Property, and Questions with Individual Creditors having a Right to Sell.*

At the meeting after the examination (*see* p. 395), or at a meeting called for the purpose, the creditors may give directions for the recovery, management, and disposal of the estate. Where there is heritable property, they may determine whether it is to be disposed of by voluntary public sale, or to be brought to judicial sale (§ 73). If the creditors have resolved on the manner in which such property is to be disposed of, before a creditor having a power to sell has commenced proceedings, he is barred from proceeding, " or if such proceedings, after being commenced prior to the date of such resolution, have thereafter been unduly delayed, such creditor shall not be entitled to interfere with the sale by the trustee (§ 89).

If a public sale of the heritable estate be resolved on, it is to be by auction, at the upset price and in the manner fixed by the trustee, with consent of the commissioners; and if the estate be sold, the trustee, with their consent, grants a disposition to the purchaser, which conveys the right in the trustee, under burden of the preferable securities (*see above*, p. 360), discharging the estate of all other securities, and of

* See Part XIV. Chap. VII. Sect. 1.—† See Part XIV. Chap. VII. Sect. 2.

diligence not completed at the date of the sequestration (§ 90).

If a creditor with power to sell, concur with the trustee in the sale, the trustee sells in his own name, and the articles of roup and conveyance are executed by him with consent of the creditor and the commissioners; "and the price shall be paid by the purchaser to the parties legally entitled thereto, and, in so far as not paid at the time of the delivery of the conveyance, it shall be consigned in the bank in which the money of the sequestrated estate is deposited; which payment or consignation of the price shall free and discharge the estate sold and the purchaser from all securities preferable to that of the said consenting creditor, in so far as the debts in such securities are satisfied by such payment or consignation, and also from the security of the consenting creditor, whether the debt in such security be satisfied or not, and from all securities postponed to the security of such creditor" (§ 91).

"A creditor who holds an heritable security preferable to the right of the trustee, with a power to sell, may sell in terms of his bond, notwithstanding the sequestration; and it shall be competent to the trustee to concur therein, in order to fortify the title; and the trustee, or any posterior heritable creditor preferable to him, may, by petition to the Lord Ordinary or to the Sheriff, compel the creditor and the purchaser to account for any reversion of the price" (§ 92).

If the creditors resolve on a judicial sale, the trustee may carry it on as to a part or the whole of the estate. Every heritable creditor in possession must be cited upon induciæ of fifteen days, whether within Scotland or not, and it is not necessary to call any other parties. "On the estate being sold, the price, after satisfying any securities preferable to the right of the trustee, shall be paid by the purchaser to the trustee; and the purchaser shall, upon payment of the price, receive a discharge from the trustee, which, with the decree of sale, shall free and discharge the estate in the same way as a decree of sale in an action of ranking and sale" (§ 93). (*See below, Chap.* IV.)

No expenses connected with the sequestration or sale are payable out of such part of the price as may be necessary to discharge the preferable securities; and no preferable heritable creditor is liable for any such expense unless he have consented to the sale, in which case he is liable for the expense of the sale (§ 94).

A creditor may purchase any estate sold under the act, but the interim-factor, trustee, and commissioners, may not purchase (§ 99). As to the remaining estate and outstanding debts, *see below*.

SECT. 12.—*Declaration of Dividend, and Ranking of the Creditors.*

Lists.—The commissioners at their meeting within fourteen days after expiry of six months from the date of the sequestration (*see* p. 389), declare what amount may be distributed in dividends (§ 103); and within the same fourteen days, if a dividend is to be made, the trustee must examine the oaths and grounds of debt, and in writing reject or admit them, or require farther evidence, stating the reasons where he rejects. He then makes up two lists; one, of the creditors he ranks as entitled to draw dividends, specifying their debts, with interest to the date of the sequestration, and distinguishing the ordinary from the preferable creditors. The other list is of the creditors whose claims he has partially or wholly rejected (§ 104).

Rejected Claims.—When the trustee notifies to the creditors the payment of a dividend (*see below*, p. 405), he must likewise send a notice to those whose claims are rejected, with a copy of his deliverance, and a statement of the sum which would be payable if the claim were not rejected. A creditor may appeal by a note to the Lord Ordinary or the Sheriff; but if no such note be marked by the clerk of court before expiry of thirty days from the date of the Gazette announcement of the dividend, the trustee's decision is final as regards that dividend, without prejudice to a new claim on occasion of a future dividend (§ 105).

Securities.—A creditor who holds a security over the estate, before being ranked, must put a value upon the security on oath, deduct it from his debt, and specify the balance, on which alone he can rank for a dividend. The trustee, with consent of the commissioners, is entitled either to demand an assignation to the security on paying the value put upon it by the creditor, out of the first of the common fund, or to let the creditor take the benefit of his security (§ 37).

Interest.—In cases where interest from the date of the sequestration is deducted as above (p. 383), from a debt on which interest would otherwise run, the creditor is entitled

to claim "the full amount of the interest on his debt in terms of law," in the case of there being a residue after discharging the debts ranked (§ 32).

Company Debt.—Where creditors claim on the estate of a partner for a company debt, the trustee on the partner's estate, before ranking them, must "put a valuation on the estate of the company, and deduct from the claims of such creditors such estimated value, and rank and pay to them a dividend only on the balance"—the trustee's judgment being subject to review by the Sheriff or Lord Ordinary (§ 38).

Claim on Co-obligant.—The creditor's right to claim a dividend on his whole debt, is not restricted by his right to claim payment of the whole or any portion of it, from a co-obligant, or from any source other than the bankrupt estate.[1]

Part Payment.—Payment of a part of a debt from any quarter other than the bankrupt or his estate, if it be made before the sequestration, diminishes the debt, so that the creditor ranks on the balance only; but, if made after the date of the sequestration, it leaves the creditor entitled to rank for the full original debt, provided he do not draw more than full payment.[2]

Contingent and Annuity.—In the case of a debt payable on a contingency, which takes place before the debt is valued (*see above*, p. 384), a dividend is payable on its full amount; but the payment is not to "disturb any former dividends allotted to other creditors." If the contingency have not taken place, the dividend is only for the value as fixed (§ 39). An annuity creditor whose annuity is valued as above (*see* p. 384), ranks for the value so fixed (§ 40).

Cautioners and Co-obligants.—Where one is cautioner for an annuity, he is not liable to be sued for the annuity after the date of the sequestration, but is only liable for the value fixed as above, and the arrears of annuity. On making payment of such value and arrears, with interest, he is discharged of liability for the annuity, and may rank in the sequestration for the sum so paid. But "if such cautioner shall not pay the sum so fixed and arrears as aforesaid, before any payment of the annuity subsequent to the fixing thereof becomes due, he shall be bound to make payment of the said annuity, and all subsequent annuities, until he shall make payment of the sum so fixed, arrears of annuity, and interest as aforesaid, deducting always such

[1] See Authorities in Law of Bankruptcy, &c. p. 546.—[2] Ibid. p. 547.

dividends as the creditor shall have received before full payment as aforesaid" (§ 41).

"Where a creditor has an obligant bound to him along with the bankrupt for the whole or part of the debt, such obligant shall not be freed from his liability for such debt in respect of any vote given, or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition, but such obligant may require and obtain, at his own expense, from such creditor, an assignation to the debt on payment of the amount thereof, and in virtue thereof enter a claim on the said estate, and vote, and draw dividends, if otherwise lawfully entitled to do so" (§ 42).

For further information as to the ranking, see *Sect.* 10, p. 399, where questions between creditors holding preferable securities, and the trustee as representing the creditors in a body, are discussed, and *Sect.* 4, p. 383, where the qualifications which entitle a creditor to vote are considered. See also as to the order in which creditors are ranked, when the special rules of the sequestration act do not apply, *Chap.* I.

SECT. 13.—*Payment of Dividends.*

Times of Payment.—Where there are sufficient funds realized, the dividends are respectively payable on the first lawful day after the expiration of the following periods, viz. the first, of eight months from the date of the sequestration; the second, of twelve months from the same date; and future dividends after the expiration of four months from the date of the payment of the immediately preceding dividend, until the whole funds be distributed (§ 101).

Time of Claiming.—To entitle a creditor to payment of the first, or of the second, or of any other dividend, he must produce his oath and grounds of debt (*see above*, p. 381) at least two months before the time fixed for payment of the particular dividend on which he means to claim, "provided, that if a creditor has not produced his oath and grounds of debt in time to share in the first dividend, but has done so in time to share in the second dividend, he shall be entitled, on occasion of payment of the second dividend, to receive out of the first of the fund (if there be sufficient for that purpose) a sum equal to the dividend he would have drawn, if he had claimed in time for the first dividend; and the same rule shall apply as to all subsequent dividends" (§ 102), so that he may claim at any time during the course of the sequestration, and is entitled to participate in any

dividend paid two months beyond the time of lodging his oath and vouchers.

Vouchers.—Before being ranked for a dividend, the creditor must lodge the vouchers of his debt, as in the case of making a claim for a qualification to vote. If not in possession of vouchers previously to the period for lodging claims to participate in any dividend, he is to state in his oath the cause why the accounts and vouchers are not produced, and in whose hands they are. The oath then entitles him to have a dividend set apart till a reasonable time be afforded for production of the accounts or vouchers, " or otherwise establishing his debt according to law" (§ 11).

Notice.—After the expiry of the fourteen days within which, on the expiry of the six months from the date of the sequestration, the trustee has to make up his state and rank the creditors (*see* p. 403), he must advertise, in the immediately ensuing Edinburgh Gazette, the time and place for payment of the dividend; and on or before the first lawful day after the fourteen days, he must notify the same to each creditor by a post letter, specifying the amount of the claim and dividend, sending intimation at the same time to rejected claimants (§ 105). (*See* p. 403.)

Scheme and First Dividend.—Before the expiration of eight months from the date of the sequestration, the trustee has to make up a scheme of division of the fund to be divided, apportioning it among those creditors whose claims have been sustained by him or by the Lord Ordinary or Sheriff, or who have appealed against his decision. The scheme must be patent to all concerned, and at the time and place appointed as above the trustee pays the dividends in terms of the scheme (§§ 106, 107).

Reserved Dividend.—The trustee must " lodge the dividends apportioned to those claims which are under appeal, but not finally determined, and the dividends effeiring to contingent creditors, or other claimants not then entitled to uplift the same, in the bank appointed by the creditors, or failing such appointment, in one of the said banks (*see* p. 390). in a separate account; or if the money be deposited in bank he shall transfer it to a separate account, in name of himself and the commissioners, to remain therein until the said appeals be disposed of, or the dividends are payable" (§ 107).

Second Dividend.—At the expiration of ten months from the date of the sequestration, the trustee again makes up a state within fourteen days, and the same order of proceed-

ings is repeated, the dividend being payable after expiration of twelve months from the date of the sequestration (§§ 108, 109).

Other Dividends.—The like proceedings take place from time to time until the funds are exhausted, in such manner that each dividend is payable on the first lawful day after expiry of four months from the immediately preceding one (§ 110).

Postponement.—The commissioners may postpone a dividend till the period for making the next ensuing dividend, directing the trustee to give notice in the Edinburgh Gazette. Notwithstanding the postponement, the trustee's state must be made up and the accounts audited, an abstract of the state being sent by post to each creditor, unless the commissioners direct otherwise (§ 111).

SECT. 14.—*Composition Contract.**

Earliest Period for Offer.—At the meeting for electing a trustee (*see above*, p. 385), the bankrupt or his friends, or in case of his decease his representatives, or in case of a company, one or more of the partners, may offer a composition with security for its payment. If a majority in number, and nine-tenths in value, of the creditors present, resolve that the offer be entertained, the trustee must advertise in the Edinburgh Gazette a notice that it has been made and entertained, and that it will be decided upon at the meeting to be held after the examination, specifying the hour, day, and place. He must also "transmit by post letters to each of the creditors claiming on the estate, or mentioned in the bankrupt's state of affairs, containing a notice of such resolution, and of the day and hour at which, and the place where the said meeting is to be held, and specifying the offer and security proposed, and giving an abstract of the state of the affairs and of the valuation of the estate, so far as the same can be done, to enable the creditors to judge of the said offer and security" (§ 113).

Disposal.—If, at the meeting after the examination a majority in number and nine-tenths in value accept the offer, a bond by the bankrupt and the proposed cautioner

* The plan of a voluntary composition contract as a method of superseding a portion of the judicial proceedings in a sequestration, for some time practised in Scotland, was at a later period incorporated with the bankrupt law of England (6 Geo. IV. c. 14, §§ 133, 134), and with that of Ireland (6 & 7 Wm. IV. c. 14, §§ 151, 152).

must be lodged with the trustee. The trustee then subscribes and transmits a report of the resolution with the bond to the bill-chamber or sheriff-clerk for the approval of the Lord Ordinary or Sheriff (as the trustee may select); who, after hearing any objections, if he find that the offer with the security has been duly made, and is reasonable, and has been properly assented to, pronounces a deliverance of approval. If the Ordinary or Sheriff refuse to sustain the offer, or reject the vote of any creditor, he must specify the grounds of refusal or rejection (§ 114). Before the judicial approval, the trustee's accounts must have been audited, the balance due by him fixed, his remuneration ascertained; and the remuneration with the expense of the sequestration must have been provided for (§ 117).

Subsequent Period for Offer.—At the meeting held after the examination, or at any subsequent meeting called for the purpose by the trustee with the consent of the commissioners, an offer may be made in a similar manner, and may be entertained by a majority in number and four-fifths in value. The offer is decided on at a meeting held not less than twenty-one days thereafter, of which fourteen days' notice is given in the manner and to the effect above specified. The offer may be finally accepted by a majority in number, and four-fifths in value, subject to judicial approval as above (§ 115).

Second Offer.—If an offer have been made, and is rejected, or has become ineffectual, no second offer can be entertained, unless the amount of composition and terms of payment be subscribed by the cautioner, and nine-tenths of the creditors in number and value give a written assent to entertain it. On these preliminaries the trustee calls a meeting, and the offer may be presented for judicial approval as above, if a majority in number and nine-tenths in value of those present at the meeting accept, and if nine-tenths in value of all the creditors who have produced oaths assent (§ 121).

The sequestration proceeds in the usual manner, notwithstanding an offer of composition, and is not interrupted until the bankrupt's discharge is pronounced or confirmed by the Lord Ordinary; the trustee and his cautioner being liable to account for his proceedings to the bankrupt and his cautioners, on their petitioning the Lord Ordinary (§ 118).

Neither the bankrupt nor the cautioner can object to any debt which the bankrupt has given up in his "state" (*see above*, p. 394), or which he has admitted without question to be reckoned in the acceptance of the offer, nor to any security, unless the debt or security have been objected to

in the offer, and written notice have been sent to the creditor (§ 119). The cautionary obligation ought to cover not only the claims advanced but all that may be brought forward; and so under the old act the court would not admit a deposit of a sum equal to the amount of the composition on the debts ranked, as an equivalent.[1]

Prescription in favour of Cautioner.—No creditor who has not produced his claim before the date of the judicial approval of the composition has any claim against the cautioner after two years from that date, reserving his claim for the composition against the bankrupt (§ 120).

As to the bankrupt's discharge on a composition, *see above*, p. 408.

SECT. 15.—*Winding up and Disposal of Unclaimed Dividends.*

"If, on the lapse of twelve months from the date of sequestration, it shall appear to the trustee and commissioners expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they shall fix a day for holding a meeting of the creditors to take the same into consideration; and the trustee, besides advertising the same in the Edinburgh Gazette, shall, fourteen days before the day appointed, send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with a valuation of the estate and effects, and a list of the outstanding debts and of the consigned dividends; and if three-fourths of the creditors in value assembled at the meeting shall decide in favour of a sale in whole or in lots, the trustee shall cause the same to be sold by auction, after notice thereof published at least once in the Edinburgh Gazette one month previous to the sale, and in such other newspapers as the creditors at the meeting shall appoint" (§ 112).

When the trustee has deposited the unclaimed dividends in a bank at the direction of the bill-chamber clerk (*see* p. 393), they are entered in an "account of unclaimed dividends." A book is to be kept in the office of the bill-chamber clerks, entitled "Register of Unclaimed Dividends," containing a list of the names arranged alphabetically, of all the creditors entitled to such unclaimed dividends, and stating in what bank they are deposited, patent to all persons.

[1] M'Vicar, 28th November 1829.

After the discharge of the trustee, any person producing evidence of his right may apply for authority to receive a dividend, to the Lord Ordinary, who, being satisfied of the claimant's right, grants warrant for payment. The claimant is not entitled to interest, all such interest going into a general fund, of which an account must be kept by the bank, to be called "The Interest Account of Unclaimed Dividends," "and which fund shall be applied in such manner as shall be regulated by any act of parliament; and if at the end of twenty-five years from the date of closing any sequestration there shall remain in the bank any unclaimed dividends belonging to the estate, the same shall be vested in government stock, and the dividends thereon shall be regularly accumulated for the purpose of forming a fund for defraying the expense of proceedings in bankruptcy, or otherwise as parliament shall hereafter direct; and the said banks shall once yearly at least balance the said accounts, and accumulate the interest with the principal sum, so that both shall thereafter bear interest as principal; and if any such bank fail to do so, such bank shall be liable to account as if such money had been so accumulated" (§ 135).

SECT. 16.—*Frauds and Offences.*

Collusive Preferences.—"All preferences, gratuities, securities, payments, or other consideration not sanctioned by this act, granted, made, or promised, and all secret or collusive agreements and transactions, for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void." If any creditor be knowingly connected with such a transaction, the trustee is entitled to retain his dividend, and the trustee or any ranked creditor may petition the Lord Ordinary or Sheriff that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, or other consideration. If decree be pronounced accordingly, the sums so recovered, under deduction of expenses, are to be distributed among the other creditors under the sequestration. If the sequestration have been closed, any creditor who has not received full payment may raise a multiplepoinding in name of the person who has obtained the preference, &c.; and on the value or amount being ascertained, double the same, together with the amount of the debt of the colluding creditor,

will be ordered to be consigned by him, to be divided among those creditors who were ranked, or entitled to be ranke and have not received full payment, who lodge claims in the multiplepoinding, according to their respective rights and interests. If any surplus be thus produced, it goes to the account of unclaimed dividends (§ 124).

The bankrupt, if cognizant of any such proceeding, forfeits the privileges of the act, and if he has not made a fair surrender, he may be prosecuted by the trustee (§§ 125, 126). (*See above*, p. 394.)

Perjury.—Any person taking a false oath or affirmation under the act may be prosecuted by the Lord Advocate, or (if the prosecution be authorized by a majority in value at a meeting called for the purpose), by the trustee with concurrence of the Lord Advocate. A person convicted, besides the legal punishment, forfeits all claim on the estate, any sum he would be entitled to being distributed as above (§ 137).

SECT. 17.—*Jurisdiction, and Miscellaneous Arrangements.*

Appeals, against Resolutions of Meetings, Proceedings of Trustee, &c.—The resolutions of creditors, at meetings, may be appealed against to the Lord Ordinary or the Sheriff, by note of appeal lodged with the bill-chamber clerk, or the sheriff clerk, within fourteen days. Deliverances of the trustee may be appealed against to the Lord Ordinary, or the Sheriff, within thirty days, calculated in the case of dividends from the date of the Gazette notice. The interim-factor,—sheriff-clerk acting as factor,—trustee, commissioners, and the individual creditors, are amenable to the Lord Ordinary and the Sheriff, and may be proceeded against by petition and complaint (§§ 127, 105, 64). The Lord Ordinary or the Sheriff will bring parties before him, and hear verbal pleadings, and decide with or without a record, the sheriff assigning his reasons, and if he proceed without a record, specifying the facts. Where the resolution of a meeting is appealed against, the judge may direct it to be re-considered by a new meeting (§ 127). Any decision of a sheriff, unless it be declared in terms of the act to be final, may be brought under review of the Inner-House, within twenty-one days, unless it be against a deliverance declaring the election of a trustee, when there are special regulations. (*See above*, p. 387.) During vacation, the Ordinary on the bills decides, subject to review by the Inner-House (§ 128). Judgments of the Lord Ordinary are reviewed in common form (§ 129).

The Lord Ordinary on the bills is the Lord Ordinary in all matters connected with sequestrations (§ 3).

Notwithstanding its being remitted to the sheriff (*see above*, p. 378), the process is held to depend in the bill-chamber of the Court of Session, copies of the petition, deliverance, &c., being forwarded to the sheriff, who "shall have as full power and jurisdiction as hitherto possessed by the Court of Session (subject to review) in all questions in the sequestration, except in those cases where the power is otherwise specially conferred; and the sheriff-clerk and messengers-at-arms and officers of the sheriff-court, shall have power to act in their respective offices under this act," the sheriff-clerk keeping a register of sequestrations (§ 27).

Interim Management.—The sheriff may regulate the interim management of property during the discussion of appeals or petitions and complaints (§ 130). The Lord Ordinary may, however, give directions for such management in case of appeal to the House of Lords, and in such case the sequestration is to proceed notwithstanding the appeal, "in all respects not inconsistent with, or injurious to the interests which may be affected by the appeal" (§ 131). After the sequestration is awarded, the sheriff, if it be necessary, may seal up and take charge of the books and papers of the bankrupt, and lock up his place of business until an interim-factor is chosen (§ 50).

Agents qualified to act in the Court of Session may carry on proceedings authorized by the act in the sheriff-court, being entitled to claim only the fees of sheriff-court agents (§ 132). No person by merely lodging an oath and claim, or being ranked, or receiving a dividend, or appearing or voting at a meeting, is liable "for any claim by the agent or other person employed by the interim-factor or trustee, for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate, reserving to the agent or other person so employed, right to payment out of the estate, and from the interim-factor or trustee by whom he may have been so employed in so far as the same may be competent to him; and no interim-factor or trustee shall have relief in respect of such payment against such creditor, reserving to such interim-factor or trustee relief against the estate, and against those creditors or others who may on other grounds be liable in relief" (§ 29).

Interruption of Prescription.—A creditor's petition, concurrence, or claim, interrupts prescription of his debt (*see* p. 445), and bars the statute of limitations of England or Ireland (§ 26.)

Letters.—The Lord Ordinary or Sheriff may, at any time, direct for a period not exceeding three months, that all post letters addressed to the bankrupt, be delivered to the interim-factor or trustee, to be opened in presence of the sheriff, after written notice to the bankrupt to attend if he be within Scotland (§ 97.)

Fees, &c.—The bill-chamber clerks are appointed clerks in sequestrations. They are not to receive any farther fees than 6d. for each page of 150 words, of interlocutors, or "other papers ordered or required," but are to receive an additional allowance not exceeding in all £100 a-year, payable, with other expenses occasioned by the act, from the fund arising out of a table of fees appointed by the act. They have to keep a "Register of sequestrations," which must be patent to all concerned (§§ 19, 139, 140). Along with the keeper of edictal citations, the clerks have to preserve a file of the Edinburgh Gazette, which may be inspected for a fee of 6d. (§ 143.) A table of fees is appointed for advertisements in the London or Edinburgh Gazette, under the new or old sequestration act, and under the cessio act (§ 144, and sch. L).

Exemption from Stamp.—Operations connected with the vesting of the estate are exempt from stamp duty. They are described as "all conveyances, assignations, instruments, discharges, writings, or deeds," relating solely to property which, after the execution of the deed, remains part of the bankrupt estate, for the use of the creditors; also "all deeds, assignations, instruments, or writings, for reinvesting the said bankrupt in the estate; and all powers of attorney, commissions, factories, oaths, affidavits, articles of roup or sale, submissions, decrees-arbitral, and all other instruments and writings whatsoever relating solely to the estate;" "all other deeds and writings forming part of the proceedings," and all advertisements in the Gazettes (§ 145).

CHAPTER IV.

JUDICIAL SALE AND RANKING.

A PROCESS of judicial sale may be pursued by any creditor whose debt is made real on the heritable property, either by

adjudication,* or by a voluntary burden.† He must be "in possession," either naturally by occupancy, or legally by an action of mails and duties against the tenants, or sequestration for rent.[1] The process may likewise, with some variation, be pursued by an apparent heir who has not been entered,‡ in regard to lands left by an ancestor.[2]

To justify a process of ranking and sale, at the instance of creditors, there must be insolvency in relation to the subjects against which the sale is directed. It is sufficient, to this end, that the interest of the debts, and the other annual burdens, exceed the yearly income of the subjects under sale, or that the proprietor's estate has been sequestrated.[3]

On the relevancy of the action being sustained, a proof of the rental and value of the estate is allowed, for the purpose of instructing the bankruptcy. A term is assigned for the creditors to produce "all their claims, rights, and diligences," under condition that if not produced they are to be held to be false and ineffectual. The interlocutor must be advertised, three successive weeks after its date, in the Edinburgh Gazette.[4]

A proof is then taken, on commission, according to the ordinary rules of evidence, of the rental of the estate, or of the interest in it enjoyed by the debtor as liferenter, &c., allowance being made for burdens and deductions, public and private. If any creditor appear and "produce a real right," he is entitled to concur in the proof.[5] §

The calling of a summons of judicial sale by a creditor precludes the debtor from voluntarily alienating or dilapidating the property.[6] If decree of sale is finally pronounced in the process, it is held in questions of ranking as if it had been pronounced at the date of the calling of the summons, and no separate adjudication can proceed during the dependence of the action.[7] If the pursuer of the action abandon it, any creditor "in a situation to adjudge" may proceed with it.[8]

Sequestration and Factor.—When a judicial sale has been commenced, the Court, on the petition of a creditor holding a security, will sequestrate the estate for behoof of all who are entitled to rank on it for payment of their debts.[9] In the

---

* See p. 473.—† See p. 338.—[1] 1681, c. 17. B. C. ii. 258.—‡ See p. 101.—[2] 1695, c. 24.—[3] 1690, c. 20. 54 Geo. III. c. 137, § 7.—[4] A. S. 17th January 1756, § 1; 11th July 1794, § 1.—[5] A. S. 24th February 1692.—§ See the Law of Bankruptcy, &c., p. 665.—[6] B. C. ii. 261, but see B. C. ii. 155. Carlyle *v.* Lowther, 27th February 1766, M. 8380.—[7] 54 Geo. III. c. 137, § 10.—[8] Ibid.—[9] D. P. 674.

interlocutor awarding sequestration, a factor is appointed, generally at the recommendation of the creditors, to administer the property for the common behoof.[1] The factor must find caution to the satisfaction of the clerk of court, with whom also he must lodge a rental of the estate and an account of arrears, within six months after his appointment. He must report alterations in the rents within three months after their occurrence, and he must once every year lodge an account of charge and discharge.[2] The factor is authorized to uplift the rents, and pursue tenants in arrear, whether with removings or other diligence. He is an administrator only, entitled to expend the sums necessary for management, but not to pay creditors. He "is not at liberty to do any thing, however much it may tend to improve or ameliorate the subject, if not absolutely necessary for its preservation."[3] The court does not, except in very urgent cases, interfere to authorize acts by judicial factors, leaving them in the ordinary case to their own responsibility.[4]

Common Agent.—The creditors elect a common agent to represent their interests as a community, independently of such agents as they may individually choose for the purpose of urging their respective claims. The common agent is chosen at a meeting advertised, through the Minute-book and the Edinburgh Gazette, fourteen free days previously. He is elected by a majority in value of the creditors, appearing by themselves or by mandataries; the qualification of each creditor being an oath of verity by himself, or (if he be out of Britain) an oath of credulity by his agent, produced, along with the grounds of debt, at least twenty-four hours before the meeting.[5] Debts, consisting of annuities or life-rents, are valued at ten years' purchase.[6] No creditor can be appointed common agent. On being confirmed by the court, the agent applies for a term to be assigned, at which all creditors must produce their claims and vouchers, under penalty of their being held null.[7] He must make up a state of the claims, and of the questions or disputes affecting them, suggesting an order of ranking.[8]

A Committee of Creditors may be appointed at the meeting for electing the common agent; they are three in number. If the proceedings be not terminated within two years, they have to inquire into and report the reasons of delay.[9]

---

[1] E. ii. 12, 57. D. P. 676.—[2] A. S. 22d November 1711, §§ 6, 7, 8.—[3] D. P. 680.—[4] Ibid. See the Law of Bankruptcy, &c., p. 667. B. C. ii. 265.—[5] A. S. 11th July 1794, § 2.—[6] Ibid.—[7] Ibid. 17th January 1756, § 3.—[8] Ibid. 1794, § 7.—[9] Ibid. § 14.

"They perform the duties of a standing committee for advising the common agent in all difficult points of management, and giving notice to the creditors of any important crisis requiring their united deliberations."[1]

Sale.—The Process of Sale is a separate course of proceedings which may have commenced before the Decree of Ranking is pronounced. The warrant proceeds on a memorial and abstract of the proof, remitted to the Lord Ordinary, and reported to the court. The interlocutor granting the warrant must be advertised once in the Edinburgh Gazette, and must be edictally executed.[2]

The sale takes place in the Parliament House at Edinburgh, under the eye of the Lord Ordinary on the bills. The articles of roup and inventory of title-deeds are authenticated by his signature. If any alteration of the articles be sought after they are so signed, application must be made to the court.*

The various claims of the creditors, after they have been discussed, are extended by the common agent in a draft of a decree of ranking, to be signed by the Lord Ordinary. Any creditor, who may not have previously claimed, is entitled to claim his share in the division, on payment of the expense occasioned by the delay.[3] The principles on which creditors fall to be ranked have been already considered (*see* p. 356 *et seq.*).

CHAPTER V.

Cessio Bonorum.

Sect. 1.—*Introductory Remarks.*

The action of Cessio, by which a debtor, on giving up his whole available property to his creditors, is relieved from all existing diligences against his person for civil debts, had a very early existence in the common law of Scotland as derived from the civil law. England was for a long time without a similar system. Formerly, when the gaols became

---

[1] B. C. ii. 269.—[2] 1681, c. 17; 1690, c. 20. A. S. 24th February 1692; 11th March 1777; 23d November 1793. 54 Geo. III. c. 137, § 6.—* See the Law of Bankruptcy, &c., p. 674.—[3] A. S. 1794, § 12.

over-crowded, temporary insolvent debtors' acts were passed for the purpose of emptying them, and there were permanent acts for the relief of insolvent prisoners confined for small debts. By 1 Geo. IV. c. 119, a temporary act was passed for the establishment of a general system for the relief of insolvent debtors, and a special tribunal was appointed for the purpose. This act was renewed, and improved from time to time, until its powers were much enlarged by the act 1 & 2 Vict. c. 110, commonly called "the act for abolishing imprisonment for debt." This act contains minute and careful provisions for the realization and distribution of the whole estates, real and personal, of insolvent debtors. It is in fact a complete code of bankruptcy, applicable to individuals who are not traders; and it differs from the law of cessio in this, that it is not merely a system to be taken advantage of by the debtor, but one which, like our sequestration law, can be forced upon him by his creditors. Two other statutes have more lately been added to the insolvent debtors' system, which make a species of simple bankruptcy process apply to small traders.[1]

The action of cessio was formerly competent only before the Inner-House of the Court of Session, and decree could not be awarded until after the debtor had been a month in prison. By act 6 & 7 Wm. IV. c. 56, the process is extended to the Sheriff Courts, and is conducted as follows:—

SECT. 2.—*Practice in Sheriff Courts.*

If a debtor is liable to imprisonment on a warrant following a charge to pay a civil debt, or if he be in prison under such authority, or have been imprisoned and liberated, he may apply to the sheriff for decree of cessio, and for liberation during the discussion of the application, by a petition stating his position as above, his inability to pay his debts, and his willingness to surrender his estate for behoof of his creditors. In the petition he must insert a list of his creditors, with their designations and places of residence, so far as known to him, and he must produce with it official evidence of liability to be imprisoned, or a gaoler's certificate of imprisonment, or imprisonment and liberation, as the case may be.[2] When the debtor is a sequestrated bankrupt, he must produce a certificate signed by the trustee, or a majority of the commissioners, stating whether the bankrupt

[1] 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.—[2] 6 & 7 Wm. IV. c. 56, §§ 2, 3.

has attended the diets for his examination, and how far he has made a full and fair surrender, and conformed with the sequestration act. The sheriff may act on this certificate, may require a special report from the trustee and commissioners, or may order them to attend for examination. The trustee and commissioners are declared to be bound, within eight days after requisition, to grant the certificate, and if they do not, the cause may be proceeded in as if it had been granted.[1] On receiving the petition, the sheriff directs the debtor, by advertisement in the Edinburgh Gazette, to intimate its presentation, and to require the creditors to appear in court on a certain day not less than thirty days from that of the notice, and within five days after such notice to send letters, post paid, to the creditors, according to the list in the petition, containing a copy of the Gazette notice, or, within ten days, to cite them judicially.[2] The debtor is ordained to appear on the same day, for public examination. In the mean while, on or before the sixth day prior to the day of meeting, the debtor must lodge with the sheriff-clerk a state of his affairs, subscribed by himself, with all his books, papers, and documents, and a copy of the Gazette. If he has sent letters to his creditors, he must produce a certificate by his agent, or by a messenger or sheriff-officer, and a witness, of the date and place of putting them into the post-office, of the individual address of each, and of the payment of postage; or, if he has cited them, he must produce an execution by a messenger or sheriff-officer, and one witness.[3]

On the day of meeting, the debtor is to be examined by the sheriff on oath or affirmation; and if he do not answer satisfactorily and subscribe his declaration, decree will be refused in the mean time.[4] Creditors, by moving that the debtor be examined on oath, are not debarred from adducing other evidence in opposing the cessio.[5] In the general case, the sheriff is authorized to allow proof if he think it necessary, to hear verbal pleadings, and to grant the decree, or to refuse it in the mean time, or to grant it with a condition that it cannot be made effectual for some given period, stating the grounds of his decision, when he does not grant an unqualified decree of cessio.[6] Where a petition is depending before him, the sheriff may, on production of a copy

[1] A. S. 6th June 1839, § 10.—[2] 6 & 7 Wm. IV. c. 56, § 4. A. S. 6th June 1839, § 3.—[3] Ibid. § 5.—[4] 6 & 7 Wm. IV. § 5.—[5] A. S. § 12.—[6] 6 & 7 Wm. IV. § 6.

of the Gazette, and proof of intimation as above, grant warrant of liberation if the debtor is in gaol, and if he is not, of personal protection for a discretionary period, provided the debtor lodge with the clerk of court a bond of caution for his appearance in court, with a penalty, to be divided among the creditors if forfeited.[1] No interim protection can be granted until the time when parties have notice to appear, as above;[2] and a decree refusing or postponing the cessio is a recall of an unexpired personal protection.[3] The amount of caution is not regulated by the act, and sheriffs have been in the habit of proceeding on their own discretion. It does not appear that caution to the amount of the whole debts has been generally required, but there is no fixed criterion, and in some cases less than the amount of the Petitioning Creditor's debt has been held sufficient.[4] The sheriff's warrants of liberation, of protection, and for bringing the debtor before him for examination, are effectual in all parts of Scotland.[5] When decree is granted by the sheriff-substitute, a party aggrieved may reclaim within six days; and if he intimate in his reclaiming petition his desire that if the sheriff-substitute be inimical to it, it shall be laid before the sheriff, it must be transmitted accordingly.[6]

SECT. 3.—*Practice before Court of Session and House of Lords.*

Review.—The judgment of a sheriff may be brought to the Court of Session for review by a reclaiming note lodged within ten days from the date of the judgment. Twenty days are allowed where the decision is by the sheriff of Orkney. A copy of the note delivered within the period is sufficient warning to the other party.[7] If the note be enrolled during session, it comes before the Inner-House, by which it may be remitted to the Sheriff or to the Lord Ordinary on the Bills during vacation or recess.[8] During these periods, the case is considered by the Ordinary on the Bills, but it comes under the consideration of the Inner-House if the proceedings are not brought to a termination before it resumes its sittings.[9]

Original Process.—The process of cessio may be instituted in the Court of Session, with notice to the creditors by advertisement in the Gazette, and letters or citations to appear

---

[1] 6 & 7 Wm. IV. § 15.—[2] A. S. § 6.—[3] Ibid. § 21.—[4] See Illustrations, in the Law of Bankruptcy, &c., p. 264.—[5] 6 & 7 Wm. IV. § 15.—[6] Ibid. § 7.—[7] Ibid. § 8.—[8] Ibid. § 9.—[9] Ibid. § 10.

within thirty days of the Gazette notice.[1] The letters or citations, with the documents to be produced to show that the debtor comes within the act, and the certificate if he be sequestrated, are under the same regulations which apply to sheriff courts.[2] The case comes before the Inner-House, by which it may be remitted to the sheriff to examine as he does in cases commencing in his own court.[3] The case on returning to the court, is considered by the Inner-House during session, and by the Lord Ordinary during vacation and recess.[4] The judgment of the Lord Ordinary is subject to review on a reclaiming note presented within ten days.[5] The Court of Session may grant warrant of liberation or protection on caution if applied for by petition intimated to the agent of the opposing creditors forty-eight hours before it is moved.[6]

House of Lords.—An appeal from a judgment of the Inner-House to the House of Lords may be competently made within ten days, if Parliament be sitting and so many days elapse before its rising,—or otherwise within six days after the commencement of the next session.[7]

SECT. 4.—*Grounds for Refusing or Postponing Decree.*

The object of the process of cessio is, to relieve the debtor, whose embarrassments are caused by innocent misfortune, from the persecution of individual creditors, and to restore him to the faculty of retrieving his fortunes, on his giving up all his available property to his creditors. Keeping this policy in view, it was the practice of the Court of Session, before the late alteration of the law, and will most probably continue to be the custom of the tribunals intrusted with the process, to demand a full inquiry into the causes of the debtor's embarrassments, to withhold decree while he conceals any part of his property, and to punish him for fraud or a reckless sacrifice of the interests of his creditors, by prolonging the period of imprisonment at their discretion.

In one case where the debtor had been imprisoned two years and three months, the decree was refused, because there were sufficient grounds for believing that he was concealing funds; and the court observed that while such concealment was persevered in, length of imprisonment afforded no grounds for granting the cessio.[8] Thus also the benefit

[1] 6 & 7 Wm. IV. § 11.—[2] A. S. 24th December 1838, §§ 2, 3.—[3] 6 & 7 Wm. IV. § 12.—[4] Ibid. § 13.—[5] Ibid. § 14.—[6] Ibid. § 15. A. S. 24th December 1838, § 10.—[7] 6 & 7 Wm. IV. § 19.—[8] Geikie, 9th Feb. 1833. See also Taylor, 6th July 1837. Lang, 5th March 1822. Steedman, 14th May 1823. Lennox, 5th July 1825. Dougal *v.* Neilsons, 24th Jan. 1829.

was refused to a person who a short time before his bankruptcy paid to his children considerable sums of money (which he alleged were their portions), transferred his crop and farm-stocking to his brothers, and failed to give a proper account of other portions of his property.[1] Though it has been held as a principle that the debtor cannot be released while he conceals funds, yet if his fraud is irretrievable, the court has been accustomed to modify the extent of the imprisonment. In one case where there had been an extensive course of fraud and extravagance, the court, "with some hesitation," awarded cessio after the imprisonment had continued three years and nine months.[2] The want of proper books, when the dealer is of that class of tradesmen who keep books, is strong evidence of fraud, and their destruction is equivalent to proof. Among the other fraudulent circumstances on account of which cessio has been refused, are using fictitious bills, keeping false books, fraudulent appropriation of property in any form, conveying property to near relations or favoured creditors in contemplation of bankruptcy, purchasing property after embarrassments have commenced and taking the titles to children, &c.[3] There are few instances of refusal on the sole ground of extravagance; an officer on half-pay being refused the benefit of cessio in the mean time on this ground, it was granted on his being appointed to full pay, and its appearing that he would lose his commission if he were unable to join his regiment.[4]

SECT. 5.—*Decree of Cessio and its Effects.*

The decree acts as an assignation of the debtor's whole property to a trustee named in the decree for behoof of the creditors, and it is optional to them to compel him to grant a disposition of all his property to the trustee.[5] Wearing apparel and the tools of a workman are not included in the property made over.[6] It has been decided that the furniture of a teacher of languages is not excluded under the latter exception.[7]

When the debtor has an annuity, or holds an office producing an annual allowance, he must give up a portion to his

[1] Lang *v.* Campbell, 24th May 1821.—[2] Stephens, 20th November 1830.—[3] Johnstone *v.* Dougald, &c., 5th March 1822. Ure *v.* Gilchrist, &c., 5th March 1822. Foreman *v.* Davidson, 10th July 1822. M'Naught *v.* Napier, 15th February 1823. Sutherland *v.* Paul, 25th May 1827. Fernie, 10th March 1835.—[4] Arnold *v.* Lyon, 5th March and 2d July 1825.—[5] 6 & 7 Wm. IV. c. 56, § 16.—[6] B. C. ii. 594.—[7] Gassiot, 12th November 1814.

creditors. An unmarried purser in the navy, who had £50 of half-pay, was ordered to assign £20 annually.[1] An examiner of customs, with a salary of £380, whose debts amounted to £3600, and available funds to £12, was obliged to assign £200 a-year.[2] A serjeant who had half-pay amounting to £45, and whose wife had a pension of £30 a-year, had to assign £25.[3] A clergyman who had a wife and seven children, and whose debts, amounting to £1868, were chiefly occasioned by losses in farming, had to assign half his stipend of £150.[4] In the case of an officer on half-pay, the circumstance that his wife had a separate income was considered, though it was entirely at her own disposal.[5] An officer in the army, whose debts amounted to about £200, whose half-pay was £127, 15s., and who had a wife and two children, was ordered to assign £30 for the first year, and £35 for the subsequent years.[6] An exciseman was not obliged to assign part of his salary, when the effect of his doing so would have been his dismissal;[7] and the cessio was granted to a serjeant, with a pension of 2s. per day, without his assigning any part of it, he having two children, and being incapacited for service by wounds.[8] In fixing the proportion of salary to be assigned by public servants, and indeed in deciding whether they are to part with any portion of it, it will be for consideration whether the interests of the public are likely to be injured. In some departments it has been the policy to give very small salaries to junior officers, and to make the higher incomes of the seniors, both a temptation to steady continuance in the service, and a reward for past exertions. In such cases, while it has been found impossible consistently with the public service to retrench the incomes of the inferior officers, the higher paid seniors have had in many instances to part with a proportion of their emoluments.[9]

The decree protects the debtor from all proceedings tending to imprisonment, on the part of the creditors called to the action, commenced previously to the date of the decree; but it goes no farther. It does not, like a discharge in a sequestration, extinguish his debts, nor does it prevent those who have raised diligence against his property from pursuing it, and obtaining a legal preference. Whatever property the debtor afterwards acquires is attachable for payment of his old debts.[10]

[1] Thomson *v.* Ramsay, 23d February 1822.—[2] Mill *v.* Stratton, 9th March 1824.—[3] Holywell *v.* Frank, 6th June 1824.—[4] Harris, 11th June 1836.—[5] Clark, 23d May 1833.—[6] A. B., 2d March 1833.—[7] Chisholm, 21st June 1823.—[8] Fraser *v.* Kennedy, 12th June 1824.—[9] See the Law of Bankruptcy, &c., p. 658.—[10] B. C. ii. 596, 597.

CHAPTER VI.

VOLUNTARY TRUSTS AND COMPOSITIONS.

SECT. 1.—*Trust-deed.*

THE general nature of Trust-deeds has been considered in another part of the work. It is usual, and considered prudent, in a trust-conveyance for behoof of creditors, to appoint but one trustee to act at a time. The deed generally conveys the whole effects of the granter, heritable and moveable, to the trustee, that they may be sold, and the proceeds may be distributed among the creditors according to their just legal claims. If the debtor have heritable property, it must be conveyed by a deed which will empower the trustee to invest himself with that species of property, and the trustee's right is not completed till sasine is recorded. (*See above*, p. 233.) In ordinary moveables the trustee is invested by tradition, and it was found that household furniture retained by the granter of the trust was not exempted from the diligence of creditors.[1] In debts or other incorporeal moveables investment takes place by simple assignation intimated to the debtor. It will depend on the conveyance being thus completed before sixty days from the debtor's bankruptcy, and on the absence of previous diligence by a creditor, whether the trust is reducible by non-acceding creditors or not. (*See above*, p. 371.) That the debtor was insolvent when he granted the trust is no ground for reducing it under the act 1621 (*see above*, p. 370), as it is only fraudulent conveyances to the prejudice of creditors that are struck at by that statute.[2] No trust can be effectual to prevent a creditor who has not acceded to it from proceeding to enforce his separate debt, and those who interfere with the property of the bankrupt, without the authority of all concerned, become liable to the unacceding creditors. On the failure of a retail dealer the wholesale merchants who had supplied him with stock held a meeting at which they agreed each to take back such of his stock as was unsold, and to subscribe certain sums for the purpose of bringing the situation of the other creditors on a par with their own, and of saving to all concerned the expense of legal proceedings. They were found liable either

[1] Gibson *v.* Wilson, 29th May 1841.—[2] B. C. ii. 486, 492.

to restore the abstracted property, or to pay a non-acceding creditor in full.[1]

Accession.—By a formal deed of accession signed by the creditors, they may bind themselves, not only to abstain from separate proceedings, but to conform to certain prescribed measures to be adopted by the trustee with regard to the estate, to submit questions to the decision of arbiters, and to agree to the debtor's discharge in certain circumstances.[2] Accession to the mere extent of precluding the creditor from carrying on separate proceedings may be deduced from circumstances,—such as those of his attending a meeting where the creditors in a body agree to the trust, and its being in consequence proceeded in without any objection being taken by him.[3] A mere demand by a creditor of payment from a trustee does not amount to accession.[4] Where a party, previously to attending a meeting of creditors, intimated that if "any unforeseen difficulty should occur to prevent the proposed arrangement from being completed" he would take all competent means for his security, he was found entitled to proceed with diligence, on the property being put up to sale at various upset prices, and no offerer appearing.[5]

SECT. 2.—*Composition-contract.*

A Composition-contract is another method by which the estate of a debtor may be distributed among his creditors, without having recourse to the operation of the bankrupt laws. The most approved method of adopting such a measure is in the course of a sequestration, and in terms of the sequestration statute, if the debtor be liable to its operation. This species of composition is more fully considered above. (*See* p. 407.)

In a voluntary composition-contract the debtor having come to an understanding with all his creditors that they will release him from his liabilities, on his paying them so much per pound within a certain time, comes under an obligation to that effect, and finds caution for its fulfilment. Professor Bell says, "This properly ought to consist of a deed on stamped paper, regularly subscribed by both parties. But less formal evidence may bind the parties, and ground

---

[1] Crawford *v.* Black, 2d December 1829.—[2] B. C. ii. 501, 502.—[3] Lea *v.* Landale, 16th January 1828. Bett *v.* Smith, 9th December 1837.—[4] Campbell *v.* Macdonald's Trustees, 3d July 1829. Hamilton *v.* Queensberry's Executors, 21st June 1834.—[5] Kerr's Trustees *v.* Russell, 15th December 1832.

an action for enforcing the contract. 1. An offer by a holograph letter on the part of the bankrupt, accepted by a minute subscribed by the creditors at a meeting, will be sufficient to bind the contract. 2. If the creditors sign the agreement, not while assembled, but separately, it ought to be done before witnesses and regularly attested. But, 3. This more solemn way of signing deeds or consents, to be executed by a great number of persons, is so much neglected in practice among mercantile men, who generally think their subscription alone sufficient to bind them in the most important transactions, that the court would probably not sustain the objection on the statutes relative to the authentication of deeds, unless the party should deny his subscription."[1] It is generally a condition, that those who consent to a composition do so on the understanding that the other creditors are to follow their example, and, in such a case, if all do not accede the contract is binding on none.[2] It is essential to the principle of a composition-contract that no creditor shall be favoured above the others; and a preference to a creditor who was cautioner for payment of the composition was found illegal.[3] If the creditors accept of a composition, under certain conditions, whether as to payment or otherwise, and these conditions are broken, the original debt revives. But if the creditors not only accept of an offer of composition, but grant a present discharge to the bankrupt, without relation to the payment of the composition, they become creditors only for the new debt constituted by the composition-contract.[4]

Cautioner.—There are generally cautioners for the fulfilment of the bankrupt's obligation in the contract. If they bind themselves as full debtors, along with the bankrupt, for the composition, they will not be relieved by such indulgence by the creditors to the bankrupt, as would relieve them if they were merely cautioners.[5]

---

[1] B. C. ii. 504.—[2] Brown *v.* Macintyre, 1st June 1830. Blincow's Trustees *v.* Allan & Co., 28th August 1833, Shaw's Supplement, 118.—[3] Robertson *v.* Ainslie's Trustees, 13th July 1837.—[4] See the Law of Bankruptcy, &c., p. 678.—[5] Ibid. p. 680.

PART XIV.

LEGAL REMEDIES.

CHAPTER I.

Judicial Enforcement and Prohibitions.

Sect. 1.—*Performance of Obligation.*

Although the most usual solution of questions regarding the fulfilment of obligations is a pecuniary measurement, in the shape of damages, of the injury which the one party has suffered by the failure of the other to fulfil his obligation; yet there are many cases in which absolute fulfilment is enforced by coercive measures. Where a person has made clear his right to possession of any specific subject—such as a house which he has bought and paid for, a piece of land which was included in his lease, &c., possession is enforced by the ordinary courts; but this is not so properly to be termed a compulsory fulfilment of a contract, as a delivery to the owner of that which is his own, and a termination of wrongful possession. The most effective method of adapting an obligation for prompt fulfilment, is by inserting in it a clause of Registration for execution. In the case of the pecuniary obligations in which this clause is inserted, and in those to which the same privileges are allowed without the clause, viz. bills or notes, the sum is leviable by execution as if a decree of a court had been obtained for the amount (*see* p. 337). But when the agreement is not for the payment of money, but, as it is termed, *ad factum præstandum*, such a clause may warrant its enforcement by the compulsitor of imprisonment.[1] Where there is no such clause, the courts of law may still enforce the obligation. There

---

[1] B. C. i. 335.

is a general rule that in default of the enforcement the pursuer has his action of damages, and it is usually in this shape that redress is now sought for unfulfilled obligations. Classes of instances have, however, already been adverted to, and especially in the law of master and servant, where it is usual to have recourse to imprisonment.* In some cases the ingenuity of lawyers has suggested more suitable means of practically obtaining the fulfilment of obligations. Thus, when a person has bound himself to convey land, the right to obtain a title is generally enforced by an Adjudication in implement.[1] †

Where the obligation does not arise out of special contract, but is attached, by the ordinary course of law, to the position of any individual, the courts may enforce it. Thus we have seen that a trustee may be bound to join his colleagues in an act of ordinary management.‡ This principle was largely illustrated in the late ecclesiastical questions, where the court found that on a qualified presentee being presented to a parish, the presbytery was bound to take him on trials.[2]

Persons who are in prison for non-fulfilment of obligations *ad factum præstandum*, are looked upon by the law as the victims of their own obstinacy, and are not allowed to take advantage of the means provided for the alleviation or abbreviation of imprisonment. They have not the privilege of sanctuary, or the benefit of the act of grace or of cessio bonorum.[3]

SECT. 2.—*Interdict.*

The method by which illegal or injurious proceedings, threatened or in progress, may be stopped by judicial order, is by the writ or process called an Interdict, sued out from the court of a judge having jurisdiction in the matter to which the interdict relates. In the Court of Session, it is obtained by presenting a Note of Suspension and Interdict to the Lord Ordinary on the Bills. Parties are always heard on the question, Whether the interdict is final? but on a case of emergency being made out, such as the threatened performance of some act which is irremediable, Interim Interdict will be granted, the question whether it is to be made permanent

---

* See above, p. 265.—[1] St. iv. 51, 9. E. ii. 12, 50.—† See pp. 103, 473.—‡ See above, p. 235.—[2] Clark *v.* Stirling, 14th June 1839. Edwards *v.* Cruickshank, 18th Dec. 1840.—[3] B. C. ii. 555, 571. See pp. 417, 459.

waiting for discussion. The applicant is responsible for any damage which may be occasioned by the interdict if it be unwarrantable, and he has to find caution both for the damage that may accrue and the expense of process, unless this be dispensed with on a full hearing of parties.[1] When the note comes to be considered with the answers and pleadings of parties, there are several modes in which the matter may be disposed of. The application may be refused, the applicant being found liable to expenses.[2] The interdict may be permanently granted.[3] The interdict may not be granted while the "note is passed to try the question." The effect of this finding is, that though a case has not been made out for summary interference, the applicant for the interdict may have the question of his right to stop what he objects to tried. Interim interdict may be granted, and the note passed to try the question of right. The alternative between the two last cases will depend on the question, Whether more mischief will be done by allowing that to proceed which ought not to have been permitted, or stopping that which ought not to have been interfered with. Thus, where people had been in the custom of casting peats in a particular place, and it was maintained that they had no right to do so, interdict against them was refused, but the note was passed to try the question whether they had a right to the peats.[4] But where a whale-blubber manufactory was about to be established, which was alleged to be a nuisance, interim interdict was granted, while the question of right remained to be tried.[5]

Questions of interdict are frequently connected with disputes regarding the rights and privileges of communities, and thus belong more to the department of public law than to the present subject. Disputes as to the rights and powers of muncipal or ecclesiastical bodies, and of trustees or managers of public works; questions regarding the privileges of the citizens of towns or members of corporations, &c.; and matters relating to nuisances, to rights of way, and to others where inquiries have to be made whether individuals interfere with public rights, or the public interferes with individual rights, are generally discussed in notes of suspension and interdict.

[1] Beveridge on the Bill-Chamber.—[2] Paterson *v.* Beattie, 4th March 1845.—[3] Presbytery of Strathbogie, 14th February 1840.—[4] Murray's Trustees *v.* Mowat, 28th November 1835. See Sutherland *v.* Gilchrist, 11th June 1836. Mackenzie *v.* Magistrates of Dingwall, 19th December 1834.—[5] Trotter *v.* Fairnie, 7th December 1830. See Kirk Session of St Andrews *v.* Magistrates of Edinburgh, 31st Jan. 1835. Todd *v.* Clyde Trustees, 19th February 1841.

This form was repeatedly used in the late discussions regarding the powers of the Church courts.[1]

Interdict is a usual remedy when a palpable infringement of a Copyright or Patent-right is in progress. Before interdict is granted, however, the infringement must be very distinctly made out, and it is usual in doubtful cases to make the party charged with infringement find security, and take an account of the interim sales, as a ground for estimating damages if he should be found liable to them.

CHAPTER II.

REPARATION AND DAMAGE.

SECT. 1.—*Assythement for Homicide.*

OUR law has, from an early period, admitted the claim of the widow or the next of kin of a person killed by illegal design or culpable negligence, to damages from the party whose misconduct has caused the death, called in the old nomenclature of the law, "Assythement."[2] In 1846, the principle was introduced into the law of England, by a statute "for compensating the families of persons killed by accidents."[3]

If the slayer be executed for murder, there is no claim for assythement.[4] But if a less punishment be awarded, or the offender has fled or is pardoned, assythement is due.[5] Several acts were passed by the early parliaments for the protection of the interests of private parties when homicides were pardoned by the crown;[6] and the effect of these on the law was, that "whoever founds on a special remission takes guilt to himself, and is liable in damages to the private prosecutor, as if he had been actually tried and found guilty."[7]

The law on this subject has not been settled by many decisions. It is not very clear how far the privilege may extend to more distant relations as nearest of kin in the

---

[1] Presbytery of Strathbogie, 20th Dec. 1839—14th Feb. and 11th July 1840. Middleton *v.* Anderson, 10th March 1842. Wilson *v.* Presbytery of Stranraer, 27th May 1842. Majority *v.* Minority of Presbytery of Strathbogie, 27th May 1842.—[2] St. i. 9, 7.—[3] 9 & 10 Vict. c. 93. [4] E. iv. 4, 105.—[5] Ibid. Leithhall *v.* Fife, M. 13904. Machary *v.* Campbell, M. 12541.—[6] 1457, c. 74; 1528, c. 7; 1593, c. 174.—[7] E. iv. 4, 105.

event of there not being a widow or children. In one case, where an officer had been found guilty of murder by a court-martial, but there was not a sufficient majority to punish with death, the father and brother of the person he had killed were entitled to assythement.[1]

This species of damage will be exigible though the misconduct from which it arises should not be deemed sufficient to found a criminal prosecution—as where death was caused by the want of a proper fence to a coal pit.[2] When a person is killed by the oversetting of a vehicle occasioned by careless driving, the proprietors are liable to assythement;[3] and the same principle would rule where accidents are caused by mismanagement on railways. It does not preclude the liability to damages, that the person killed did not contribute to the support of his family. But in a late case of death by careless driving, it was found relevant to prove, on the part of the proprietors of the coach, with a view to the modification of their liability, that the deceased did not support his family, but lived separate from them, and was of dissipated habits.[4]

SECT. 2.—*Injuries to Reputation.*

The general nature of Actionable Scandal or Defamation is, that it consists of any statement, written or verbal, which is intended and is likely to do injury to any individual, by the manner in which it applies to his person, habits, character, or property. *All* such statements are not of a character to entitle the parties injured to damages; but the limits of the properly actionable defamations are marked by the privileges which save the person uttering from responsibility.

The privilege may either arise out of the nature of the statement itself as justifiable, or the position of the person who makes it.

No person is entitled to injure his neighbour by maliciously calling attention to facts relating to his character, habits, or history, which, though true, are calculated to do him injury. This principle is met, on the other hand, by the right which individuals have to warn their neighbours and the public at large against the injury by contamination, fraud, or otherwise, which may be suffered through contact with persons of bad character. Hence arises the privilege of pleading the *veritas convicii*—that the statement made is true—a privilege allowed

[1] Macharg *v.* Campbell, M. 12541.—[2] Black *v.* Caddell, 13905.—[3] Brown *v.* MacGregor, 26th February 1813.—[4] Brash *v.* Steele, 27th February 1845.

where the object in making the statement is a good one, although it may injure the person about whom it is made.[1]

Justification.—Persons in giving characters of servants, writing to those whom it concerns about the method in which others conduct business and the like, have the privilege of pleading the truth of the statement. Thus dealers wrote to a customer about their agent, saying, "we are sorry indeed to state to you that we have been much disappointed by the conduct of ———; he seems to have been selecting his customers among the worst class; our confidence in him has been entirely misplaced; he has acted in such a reckless blackguard-like way, that we would consider twelve months' imprisonment too easy a punishment for him." These expressions were in themselves actionable; but the writer of the letter was allowed to prove the truth of the charge in his defence.[2]

The protection of himself and his neighbours from injury by the conduct of a party with whom they are concerned, or the protection of the public by complaints made in the proper quarter about the misconduct of public officers, or the commission of offences by individuals, are the usual cases in which statements otherwise libellous are justified by their truth.[3]

Whatever information regarding each other, however, passes among men of business, must have its object, and must not be communicated angrily or recklessly so as to do unnecessary mischief; and there are several cases where damages have been given for hasty expressions of opinion arising in the course of business transactions.[4]

In some cases, where the statement is neither made in fulfilment of the clear demands of duty nor to prevent mischief, the defender may prove facts in palliation though they do not substantiate the proof of the charge; and though in law such a plea can only stand in palliation and for mitigation of damages, juries have sometimes given full effect to them as vindications. Thus, where a person had visited the house of an acquaintance and committed a disgraceful assault on a solitary young female in the house, the master wrote to him an indignant letter charging him with "having committed a crime which the laws of society reward with the

[1] See Macfarlane on Issues, 32.—[2] Taylor *v.* Anderson, 19th March 1844.—[3] Inglis *v.* Calder, Hume 594. Thompson *v.* Gillie, 16th May 1810. Gibsons *v.* Marr, 3 Mur. 271. Craig *v.* Marjoribanks, 3 Mur. 342. Mitchell *v.* Thomson, 24th February 1829. Wight *v.* M'Luckie, 12th February 1830.—[4] Landles *v.* Gray, 1 Mur. 79. Leven *v.* Young, 1 Mur. 350. Anderson *v.* Wishaw, 1 Mur. 429.

gallows." He had not committed a capital crime, so that the statement was not true. The bench laid down the circumstance as a palliation, but the jury found absolutely for the defender.[1]

Privileged Statement.—The privilege arising from the position of the party who makes the statement, is best illustrated in the proceedings of courts of justice, where statements are frequently made which do not turn out to be true. When any statement is made by a judge, or an officer of the court, bearing in any way on the business on hand, a party, to recover damages, must be able to prove that the words were spoken with a malicious intent, and he must do so extraneously and not from the nature of the words themselves. So it was found where, on a motion for mitigation of punishment by a person convicted of poaching, two justices, as a reason against mitigation, charged him with theft.[2]

In pleadings before courts of justice, there is a considerable latitude in the charges which parties may bring against each other, or in relation to the witnesses, provided they be relevant to the proceedings; but irrelevant injurious statements are actionable slander.[3]

Corporations and bodies whose character partakes of the nature of a corporation, clerical or lay, such as presbyteries and other church courts, are entitled to enter into those inquiries which are necessary for fixing the rights and liabilities accruing to parties by the act of belonging to their body. So a kirk-session of seceders were not liable to damages for depriving two individuals of their functions as members, for alleged misconduct, according to the rules of their body.[4] So, also, the statements made by a master of his shopman to a society of Bereans, according to the rules of that body of which they were both members, were not actionable.[5]

It has been found that a clergyman is not privileged in the pulpit, and that when a parish minister had there made personal attacks on the editor of a newspaper, on account of the position which the paper had taken in ecclesiastical politics, he was found liable in damages, and that it was not necessary to prove special malice.[6]

---

[1] Ogilvie *v.* Scott, 19th March 1836.—[2] Robertson *v.* Barclay. House of Lords, 4 W. S. 102. 5 Mur. 326. Gibsons *v.* Marr, 3 Mur. 271.—[3] Forteath *v.* Fife, 18th November 1819. Young *v.* Anderson, Hume 601. Davidson *v.* Megget, 12th May 1821. Yeats *v.* Ramsay, 6th December 1825. Black *v.* Brown, 2d March 1827. Marianskie *v.* Henderson, 17th June 1841. Hustler *v.* Watson, 16th January 1841.—[4] Brownlee *v.* Kirk Session of Carluke, Hume 596.—[5] Grieve *v.* Smith, Hume 637.—[6] Adam *v.* Allan, 23d June 1841.

Malice.—It is essential to actionable defamation that it should be done maliciously; but in law malice is presumed where the circumstances indicate a design to injure, or culpable indifference whether injury arise or not.[1] Where the statement is false, malice is always the presumption.[2] Practice seems, however, to make a distinction between the originator and the mere circulator of a report. Whoever industriously propagates a slander about another—whoever takes pains to let it reach quarters where it may do mischief, is undoubtedly liable; but it has been held that the mere casual statement by an individual of a current rumour is not actionable.[3] The cases, however, in which this principle was admitted are comparatively old, and in that of Gardner the real author of the statement was named, and was under prosecution. In general it cannot be said that any person communicating an injurious statement is safe from the consequences should it turn out to be untrue. When a libel is published in a newspaper, it is no defence that other newspapers have published the same statement.[4] There must in all cases be a special intention to injure an individual, or else he must show that he has been injured through recklessness. Thus *John* Craig having been printed instead of *James* Craig, in a list of bankrupts in a newspaper, which in a subsequent number corrected the mistake, it was found that a John Craig, who could not show that he had sustained injury, was not entitled to damages.[5]

When angry and abusive expressions are exchanged in drinking parties or in quarrels, the law does not generally allow even the party who has suffered most from the tongues of the others to obtain damages in a civil action.[6] The public are the party which the law seeks to protect on such occasions by punishment when the dispute has amounted to a breach of the peace.

Where, however, a person being lawfully impeded, checked, or reprimanded by another—as, for instance, when stopped in the act of trespass, is irritated and becomes abusive, he is liable for what actionable expressions he may use.[7] When a

[1] Tytler *v.* Macintosh, 3 Mur. 244. Smith *v.* Innes, 15th February 1827.—[2] Greig *v.* Edmondstone, 4 Mur. 72.—[3] Rose *v.* Robertson, 20th May 1803, Hume 614. Gardner *v.* Marshall, 8th December 1803, Hume 620. See Scott *v.* M'Gavin, 2 Mur. 498.—[4] Aiton *v.* M'Culloch, 3 Mur. 288.—[5] Craig *v.* Hunter, 29th June 1809.—[6] Forbes *v.* Young, Hume 627. Ewart *v.* Mason, Hume 633. M'Crae *v.* Stevenson, Hume 631. Gibson *v.* Douglas, Hume 639. Harper *v.* Fernie, Hume 643. Hyslop *v.* Miller, 1 Mur. 54. Grant *v.* Smith, 15th February 1837. See Bryson *v.* Inglis, 15th January, 1844.—[7] Grahame *v.* Mackenzie, Hume 641.

person is designedly roused by another to speak in a defamatory manner of a person with whom he is at enmity, he is liable for what he says.[1]

Public Men.—When an individual has placed himself in a public position, and especially if he hold office as a servant of the public, and is remunerated for his exertions, the method in which he fulfils his duties is liable to a degree of critical inquiry to which the conduct of individuals in their private affairs is not amenable. "A member of the state," says Lord Chief-commissioner Adam, "or any inferior public officer, is liable to have his conduct submitted to public animadversion and discussion; and however severe, and however it may affect his feelings, such a publication will be protected; but if private or personal matter is brought forward, or the individual turned into ridicule, that alters the nature of the discussion."[2]

Criticism.—Upon like principles, the author of a book must submit to the freedom of criticism, and has no recourse if the press should very severely attack the literary merits of his book or the opinions he promulgates. But literary criticism must not be made the vehicle for attacks on private character or personal habits.[3]

The damages awarded in actions for slander or defamation consist generally of two elements:—1*st*, Compensation for any loss which the statement may have occasioned to the party; and, 2*d*, A solatium, as it is termed, for his wounded feelings. It is not necessary, however, that a pursuer for damages should prove that he has suffered any specific loss, if he show that the libel was intended to apply to him.[4]

In the Court of Session, actions of defamation are among those specially appropriated to Jury trial. It has long been settled that such an action can be raised in the Sheriff Court, where it will be decided without a jury; and that it is competent also to the courts of magistrates.[5] It is believed that petty actions of scandal are frequently settled in the Small Debt Courts.

Sect. 3.—*Injuries to the Person.*

Assault.—The simplest description of Personal Injury is Assault. Actions on this description of injury, when brought in the Court of Session, go to a jury with all their circum-

[1] M'Pherson *v.* M'Pherson, Hume 644.—[2] Aiton *v.* M'Culloch, 3 Mur. 291. See Hamilton *v.* Stevenson, 3 Mur. 75.—[3] Leslie *v.* Blackwood, 3 Mur. 173.—[4] Brown *v.* Wason, 22d March 1838, Macfarlane, 38.—[5] Forest *v.* Crichton, 12th December 1807.

stances, and if the assault be proved, and there be insufficient justification, or none, they award damages according to the extent of the outrage. Assault is justified by the protection of person, property, or relations. It may be questioned if any one who commences the strife by being the first to strike, can claim civil damages, although if the other party exceed in his retaliation he may be liable to trial for an offence. Provocation by personal abuse is in law no vindication of an assault, but it is generally a good ground for mitigating damages.[1] It is no bar to an action of damages that the assaulter has been criminally tried for the offence; and it is a principle of law that the damages awarded ought to consist both of pecuniary compensation for the injury, and a solatium for the wounded feelings of the sufferer.[2]

Wrongous imprisonment is a good ground for an action of damages against all concerned, whether private persons or officers of the law. A statute of the Scottish Parliament, called the act 1701, provides means by which persons apprehended under criminal charges may procure liberation, or urge on their trial. The details of this branch of procedure belong to criminal law. Distinct penalties are leviable for breaches of this act, proportioned to the rank of the sufferer, and recoverable "before the Lords of Council and Session, to be discussed by them summarily, without abiding the course of the Roll." Proceedings for the penalties must be brought within three years after they are incurred.[3] This statute does not deprive parties of their alternative of the remedy at ordinary law by action of damages before a jury; and imprisonments on conviction of crimes, as well as under summary proceedings before magistrates, with all imprisonments for civil debts, are not within the act, and are remediable by ordinary process of law. Unless in so far as they are protected by statute, magistrates and officers of the law are responsible not only for the consequences of malicious proceedings in furtherance of their own designs or of an oppressive conspiracy, but also for mischief arising from negligence or ignorance.[4] On the complaint of a seller of goods in a public market, that a purchaser had carted off the goods without paying for them, a magistrate, without written information, granted warrant to imprison him without specify-

[1] Thom *v.* Graham, 14th July 1835. See Hyslop *v.* Miller, 15th March 1816. Haddaway *v.* Goddard, Ibid. 148. Forgie *v.* Henderson, Ibid 1 Mur. 43. Lang *v.* Lillie, 4 Mur. 82.—[2] B. P. 2032.—[3] 1701, c. 6.—[4] Strachan *v.* Stoddart, 13th November 1828. Pollock *v.* Clark, 12th Nov. 1829. Richardson *v.* Williamson, 1st June 1832.

ing a conviction or the ground of imprisonment. The person was detained a quarter of an hour; an alleged local custom of the burgh was pleaded by the magistrate, but the plea was overruled, and he was found liable to damages.[1]

By a series of statutes called the Twopenny acts, for the protection of justices of peace and other judges, when their proceedings against person or property are quashed in the higher courts, they are not to be liable, besides repayment of any penalties that may have been levied, to greater damages than 2d., with no costs; and if it be shown that the person against whom the proceedings lay really was guilty, no damages or costs are recoverable.[2] The acts do not relieve the clerks of court and other officials from responsibility for irregularities.[3]

To take magistrates out of the protection of the acts, the prosecution must set forth and the evidence show that they have proceeded maliciously.[4] The several officers of the law or others who are concerned in an illegal imprisonment are responsible for their own acts, and it was found that a Procurator Fiscal was not liable for the wrong committed by officers acting in an illegal manner under his instructions, unless the illegal act were part of the instructions.[5]

Seduction is a ground for an action of damages in Scotland; but such prosecutions are of comparatively rare occurrence. The action may be brought by an unmarried woman who is the sufferer.[6] There do not appear to be any precedents on the question, whether the parents or other relatives of an unmarried female have action in such a question. It has been decided that a husband has action against the seducer of his wife.[7]

SECT. 4.—*Injuries to Property.*

Where injury is done to the property of another by the manner in which one uses his own, the injury generally comes under the term Nuisance. Where it affects many individuals, it comes properly within the department of Public Law; and though in Scotland the distinction between Public

[1] Rae *v.* Sinclair, 12th July 1838, Macfarlane, 73.—[2] 43 Geo. III. c. 141. 9 Geo. IV. c. 29, § 26. 11 Geo. IV. and 1 Wm. IV. c. 37, § 13. Malonie *v.* Walker, 21st January 1841.—[3] M'Kellar *v.* Maclachlan, 18th December 1841.—[4] Anderson *v.* Hill, 3d February 1837.—[5] Munro *v.* Taylor, 25th February 1845.—[6] Linning *v.* Hamilton, M. 13909. Buchan *v.* Macnab, M. 13918. M'Candy *v.* Turpy, 3d March 1826. Stewart *v.* Menzies, 27th June 1837.—[7] Stedman *v.* Stedman, M. 13909. Maxwell *v.* Montgomery, M. 13919. Paterson *v.* Bone, M. 13920.

and Private Nuisances is not marked by a separate method of procedure as it is in England, it is only in the case where the evil affects individuals in reference to particular property that it belongs to this department.

No one is entitled to use his property wantonly, to the prejudice of his neighbour,[1] or even to employ it for profitable purposes, if by doing so he materially injure the property of another. Thus, a manufacturer cannot use a stream in such operations as may render it "putrid and unfit for the use of man and beast" in its passage through another person's property;[2] and a limekiln was adjudged a nuisance, when it was so near a garden that "part of the march hedge opposite to the kiln was dead, and that the trees, bushes, and grass for some way from the march had suffered by the heat."[3] But if the operation carried on is important to the manufacturer, and the injury to the neighbouring proprietor not material, the law is jealous of restricting the free use of property. So, where a draw-kiln was erected very near the dwelling-house of a neighbouring proprietor, the court would not direct it to be removed, although it might be attended with inconvenience, as the spot chosen was in many respects the most commodious for the proprietor of the kiln.[4]

Where it is not very important to the individual causing the nuisance to pursue his business in that particular place which is inconvenient to a neighbour, and it is of such a description that he can easily choose a fitting place for it, a stricter rule would appear to be followed. Thus, the proprietor of an upper floor was not allowed to let it to a fencing master, whose school disturbed the tenants of the floor below.[5] A printing-office was found a nuisance in similar circumstances.[6] On the same principle, and on the additional plea of danger, a blacksmith's workshop, in a second story, was ordered to be removed.[7] Where anything connected with one tenement does damage to another—as in the case of a flow of water, &c.—the occupant of the tenement whence the injury proceeds is liable. The landlord is also liable if the injury proceed from defective construction; but he is not responsible on the simple ground of an injury having been caused, unless it be shown that his own neglect, or a deficiency in structure caused the injury.[8] Where an erection causes

[1] E. ii. 1, 2.—[2] Miller *v.* Stein, November 1791, M. 12823. Dunn *v.* Hamilton, 11th March 1837.—[3] Ralston *v.* Pettigrew, 29th July 1768, M. 12808.—[4] Dewar *v.* Fraser, 20th January 1767, M. 12803.—[5] Fleming *v.* Ure, 24th February 1780, M. 13159.—[6] Robertson, &c. *v.* Pillans, 2d March 1802, M. Ap. Pub. Police, No. 3.—[7] Kinloch *v.* Robertson, 20th June 1756, M. 13163.—[8] Weston *v.* Tailors of Potterrow, 10th July 1839.

inconvenience or annoyance to a neighbour, if the proprietor can alter it so as to terminate the nuisance, he will be directed to do so. Thus, a chimney of a stable which emitted smoke near the windows of a house was directed to be raised.[1]

A person who goes to the vicinity of a nuisance is not entitled to the same legal protection as one to whose neighbourhood it has been carried. So where one had built a villa in what was supposed to be a dangerous proximity to a quarry, and having, before he commenced building, to remove rubbish caused by the quarry, had his property injured by the accumulation of more such rubbish, he was not entitled to damages.[2]

Persons who, in the performance of illegal acts, or by culpable negligence, injure the property of others, are liable to repair the injury. But where the injury is done in the course of protecting property from trespass, or risk occasioned by the carelessness of others, there will be no right to damages, unless there has been malicious destruction or reckless violence. The ruling principle in such questions was well illustrated by a case where a stallion had broken away from the owner's field, and entered the enclosures of a neighbour where there were mares. The servants of the latter pursued the stallion, and one of them seizing a paling stab struck him. It was said that there was a rusty nail in the stab, and that the animal died of a wound inflicted by it. It was found that in these circumstances the person who struck with the stab was not liable to damages.[3]

Where property is not merely injured, but is actually taken by a person who is not the owner and converted to his own use, an action of damages is not a remedy usually adopted, except in reference to those descriptions of property which do not depend on natural possession, but on the complex operation of law. When a watch or pocket-book is removed from the possession of the rightful owner, a civil action is seldom adopted; but it is generally the protection sought when a copyright or a patent right is infringed.

Copyright.—Besides the remedy which the proprietor of copyright has against infringements of his property by ordinary law, the following special remedies are provided by the Copyright Act, 5 & 6 Vict. c. 45:—

Any person who prints within the British dominions, for sale or exportation, any copyright book, without the consent

[1] Laing v. Muirhead, 7th December 1822.—[2] Thomson v. Gray, 22d December 1842.—[3] Turnbull v. Cumming, 12th Feb. 1840.

in writing of the proprietor, or who imports for sale or hire any copies so unlawfully printed, or who is in any way accessory to the sale or hire of such pirated copies, or who has in his possession for sale or hire pirated or imported copies, is liable to an action of damages in the Court of Session (§ 15). N. B. According to the strict interpretation of this clause, the books which are condemned as imported books, are such as are "unlawfully printed" with reference to the clause which describes books printed without license in the United Kingdom. (*See above*, p. 67.) It would appear that the remedy against the importation of foreign editions is confined to the summary procedure stated below.

If the defender in an action questions the pursuer's title to the copyright, he must give notice of the objection, specifying the person whom he (the defender) holds to be the proprietor (§ 16). Persons piratically importing (viz. for sale or hire as above) foreign reprints of copyright books, forfeit the copies imported (which are liable to be seized by any revenue officer), and are liable on conviction before two justices of peace to a penalty of £10, and double the value of each copy. Of the pecuniary penalty, one half goes to the seizing officer, and the other to the proprietor of the copyright (§ 17). With reference to the protection of proprietors of copyright from piracy by importation, there is an important provision in the Tariff Act. In 3 & 4 Wm. IV. c. 52, § 58, there was a prohibition of the importation of copies of books first published within the United Kingdom, within twenty years preceding. As the customhouse-officers did not possess that literary knowledge which would enable them to state, in relation to every book found in a traveller's luggage, whether it had been written within the twenty years or not, this provision is repealed, and the prohibition is made absolute in favour of all existing copyrights; but to obtain the benefit of it, the proprietor of the copyright must send a notice of its existence and the time of its expiry to the commissioners of the customs, who make out a list of such copyright works to be distributed at the different ports.[1]

No proprietor of a work published after the date of the copyright act (1st July 1842), can take advantage of its special remedies unless he has registered his book. The want of registration does not affect the simple right of copyright, it merely deprives the proprietor of the special remedies of the act. It does not affect the exclusive right of the proprietor of a dramatic piece to license its representa-

[1] 8 & 9 Vict. c. 86, § 144.

tion (§ 24). All actions and remedial proceedings under the act must be commenced within a year after the cause of action (§ 26).

Patents.—The extent of the right which a patentee holds has been already considered.*

Except in so far as it is limited by special law, the patentee has full command over his privilege. Whenever it is infringed he can obtain damages. Questions as to the infringement of patent—whether the process said to be an infringement is the same that is covered by the patent—whether it has been practised before the patent itself was obtained, &c.—must go to a jury. If it seem necessary to the evidence of infringement, the court will authorize inspection of the alleged illegal process by persons of skill. It is not admitted as an objection to such an order that the process involves a secret in the defender's possession; but in such a case the court will take such precautions as are practicable against the secret being noted, or if it must be noted, divulged.[1]

When a person is pursued for infringement of patent, if he intend to object to the validity of the patent, he must give notice of his objections, and he can prove no others but such as he gives notice of, unless with the discretionary permission of the judge on special cause shown.[2]

Whoever, without license of a patentee, imitates his mark or stamp, or by the use of the word "patent," or otherwise, endeavours to make articles pass off as those of the patentee, is liable to forfeit £50 for each offence.[3] An article, for the making of which a patent has expired, may be without any penalty marked as "patent."[4]

SECT. 5.—*Responsibility of Innkeepers and Public Carriers.*

Those who undertake as innkeepers to receive travellers, or their cattle, or as common carriers by land or water, to convey persons and goods, without a special contract, have, since a very early period, been, by the commercial code of Europe, held under an obligation to restore all property put into their hands in the state in which they received it. The practice was founded on a fiction of law, that if the property were stolen, or in any other way was prevented from being restored in full to the owner, the custodier was presumed to be the guilty party. The principle now undoubtedly is, that

* See p. 79.—[1] Russell *v.* Crichton, 11th July 1837. Brown *v.* Brown, 9th July 1840.—[2] 5 & 6 Wm. IV. c. 83, § 5.—[3] Ibid. § 7.—[4] Ibid.

the carrier, innkeeper, &c., from the mere adoption of his profession, undertakes (with certain exceptions) to ensure the safe return of whatever property is put into his hands, unless he stipulate to the contrary.

Who responsible for Property.—The descriptions of persons responsible are, all public carriers by land, whether using as vehicles, carts or waggons, mail or stage coaches, gigs, &c. Hackney coachmen, giving themselves out merely as carriers of persons, do not come within the rule, unless they have specially engaged to carry goods. All carriers by water, as masters and owners of vessels of any description, used for public carriage of goods, come under the rule. Wharfingers are included in the class liable as carriers. Innkeepers, stablers, &c., are liable for the goods deposited in their premises by guests.[1]

The proprietor may interfere with the responsibility, by volunteering to take care of his property in his own manner. A mere arrangement, or attempted provision for better security, will not however take the responsibility from the innkeeper or carrier. A clear case of taking the things from under his charge must be shown. That the loss has been occasioned, not by the carelessness of the depositary himself, but that of another person, is, on the principle of insurance, no defence in as far as respects his servants or assistants in the concern; he is indeed liable for the goods put into their hands, as if they had been placed in his own.[2]

Commencement.—Nice questions often arise as to the state of matters in which the responsibility commences and terminates. The property must be fairly in the keeping of the carrier, &c., or his servants, and out of that of any other person. Where a shop-porter was sent along with a carter, to take a cask of spirits from the warehouse to a purchaser, and on both lowering it, the rope broke, and the cask was staved, it was found that the carter was not responsible, the cask never having been truly under his charge.[3] The time at which the responsibility commences and terminates must depend, in a great measure, on the customs of trade. It was found by a jury, that delivery of goods to a member of the Society of Carters in Leith, with a proper direction, but without a receipt, or insertion in the carter's books, was not, by the custom of Leith, proper delivery by the shipowner to the consignee as represented by the carter.[4]

[1] G. F. Jones on the Liabilities of Carriers. B. C. i. 467, *et seq.*—[2] St. i. 13, 3. B. C. i. 471.—[3] Reid *v.* Mackie, 18th June 1830.—[4] Ed. &c. Sh. Co. *v.* Ogilvie, 31st January 1819, 2 Mur. 136.

The responsibility is said to extend to every loss which is not occasioned by the act of God or the king's enemies, viz. by natural causes which could not be foreseen, or by war.[1] Fire is considered as of the former order in Scotland, if fraud be not proved;[2] but not so in England, unless it be occasioned by lightning.[3] It seems not to be decided in Scotland whether robbery comes under the latter exemption. In a case where housebreaking was committed in a lodging-house, the court did not decide whether or not a letter of lodgings was to be looked upon in the light of an innkeeper, but held that in the circumstances, even if she were so, she would not be liable.[4] Robbery is, in England, no limitation, except in case of the statutory limitations in favour of shipowners,[5] whose responsibility has been considered more at length in another place.*

The palpable carelessness of the owner—as by his depositing small and valuable articles on a passage-table of an inn, or in a stable, will exempt parties from liability; but it was found not to exempt an innkeeper, that a traveller, on his arrival, gave his greatcoat, containing in the pocket a pocket-book, in which were £74, to a waiter. The money was stolen by a servant of the inn.[6]

Persons.—The responsibility for the safety of persons who commit themselves to the charge of innkeepers and public carriers, is not founded on the principle of insurance; the safety of the traveller is not ensured, but those to whose care he commits himself are responsible for any injury he may incur by their misconduct. Thus, in the case of stage-coaches, where the slightest act of carelessness is productive of the most serious effects; "neglect of the rules of the road; rashness in going too near to the edge of the road, or to any obstruction; want of skill in driving; racing against other coaches; taking up more passengers than the law allows, where the injury can be traced to overloading as a cause;—all of these will be held sufficient to charge the principals with the effect of any accident from which loss or injury arises."[7] †

Exceptions from Responsibility.—If the carrier be not a public carrier, but specially hired, he does not ensure the safety of the property, but merely comes under a general engagement to bestow due care on it. Any public carrier

[1] Sir W. Jones on Bailments, 104.—[2] Iv. Er. 600.—[3] G. F. Jones on Carriers, 18.—[4] Watling *v.* M'Dowall, 10th June 1825.—[5] Sir W. Jones, 104. G. F. Jones, 10, 47.—* See above, p. 277.—[6] M'Pherson *v.* Christie, 6th May 1841.—[7] B. C. i. 462.—† As to deaths from careless driving, see above, p. 430.

may limit his responsibility in the same manner by special contract.

It was long a matter of dispute how far the responsibility, as defined by law, could be limited by notice,—this matter has now been arranged by statute. There are certain articles for which stage-coach proprietors are not liable if they exceed the value of £10, unless the value be intimated. The articles specified are "gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Bank of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace."[1] Coach proprietors or carriers may put up a notice in their office announcing additional rates of charge for such commodities, and all parties are bound by the notice whether they have seen it or not.[2] If such notice is not affixed, or if a receipt be not given if required for any parcel liable to the higher charge, the responsibility is not limited.[3] No *notice* can limit the responsibility, except in the cases and to the extent above stated,[4] the parties being of course entitled to make their own arrangement as to any particular transaction. If the parcel be lost, it is not taken as at the value at which it is entered—the real value must be proved in the ordinary manner.[5]*

Evidence of Loss.—The evidence of the amount of loss cannot but be of a very dubious nature. It is usual to allow the oath of the party, as supplementary to imperfect extraneous proof. The essentials of this partial proof seem to be, 1*st*, That the pursuer should prove that he has been deprived of something in the manner he alleges; and, 2*d*, That what he specifies himself to have lost was something which he might naturally, and without inconsistency, have had in his possession, and for the safety of which it was in the way of the defender's business to provide; or otherwise that he had informed the defender of what it was, and what

[1] 11 Geo. IV. & 1 Wm. IV. c. 68, § 1.—[2] Ibid. § 2.—[3] Ibid. § 3.—[4] Ibid. § 4.—[5] Ibid. § 9.—* On the subject of the limitations with regard to shipowners, see p. 277.

risk he ran:—Thus, where a person had arrived at an inn openly with a valise in his possession, and the valise was cut open, he was found entitled to give his oath as to the amount of money stolen;[1] and a person bringing an action against an innkeeper for money stolen out of a portmanteau, was ordained before giving his oath to prove that he had brought a portmanteau to the inn, and that he had a short time before received money.[2] It is ruled that the oath of the pursuer may be taken before a jury.[3] There will, however, in general, in the case of the transmission of goods of value be pre-existing evidence, in the shape of an invoice or way-bill, and it has been found that the liability is fixed by the contents of such a document.[4]

In a later case, a parcel from one merchant to another was deposited with a stabler, to be sent per carrier. The person who sent it was in the habit of so sending money. He was seen to make up and address the parcel as if it had money in it, and showed anxiety about its delivery, on hearing the failure of which he instituted an inquiry. The parcel was afterwards found in the stabler's house, filled with rubbish. The pursuer was allowed to swear that he had put £20 into it.[5]

SECT. 6.—*Breach of Engagement.*

The extent to which the obligation of a party to a contract can be absolutely enforced against him, has been considered above.* It is a general rule that the party to a contract who is a sufferer by another failing to perform his obligation is entitled to damages. The contracts to which this remedy in general applies are Sale, Trust and Service, and Letting and Hiring; and in discussing these contracts, the remedies for nonfulfilment have already received attention.† In other contracts, such as Copartnership, cases may occur where an action of damages is the proper remedy for nonfulfilment of the contract; but in the contracts of Cautionry, Insurance, and others where the payment of money is the principal element of the original engagement, it is difficult to suppose circumstances in which an action of damages can be the proper remedy. A mere promise on the one part, where there is no contract, cannot be a ground for obtaining

[1] Chisholm *v.* Fenton, 10th December 1714, M. 9241.—[2] Gordon *v.* Murray, 19th January 1700, M. 9237.—[3] Crawcour *v.* St George Steam Packet Company, 30th July 1842.—[4] Bishop *v.* Mersey and Clyde Company, 19th Feb. 1830.—[5] Williamson *v.* White, 21st June 1810.—* See p. 426.—† See pp. 149, 245, *et seq.*, 283 *et seq.*

damages, except in the peculiar case of a promise of marriage; and it may even be said that in this case there must be an understood, if there be not an express acceptance.

Our practice does not exhibit many instances of actions for simple breach of promise of marriage, because in the circumstances corresponding with those in which such actions are raised in England, Declarators of marriage are the usual recourse in Scotland. It was at first held that there could be no damage for simple breach of promise unless some pecuniary loss could be shown.[1] It came afterwards, however, to be settled law, that the injury occasioned by the non-performance of an engagement to marry was in itself a good ground for awarding damages. Where this was solemnly decided, the Lord Justice Clerk said: "To allow a man to violate the foundations of civil society, to sport with the feelings of another, and to expose her to ridicule and contempt, and to hold that he is entitled to go on to the last moment, and then to say that there is no pecuniary injury, is just to say that in this country the most grievous wrong may be done, for which this court will give no redress."[2]

CHAPTER III.

PRESCRIPTION AND LIMITATION OF OBLIGATIONS.

SECT. 1.—*The Long Prescription.*

REFERENCE has already been made to the title which may be acquired to heritable property through a series of consecutive titles, covering a period of forty years.* It is there stated that to allow this positive prescription free operation it must be accompanied by negative prescription, or the absence of any effort on the part of one who may have a competing title to put his claim in force. Independently, however, of the existence of any positive prescription, the negative will of itself operate in destroying a claim by one party in cases where it cannot be directly said that there is relative possession on the part of another. The act creating

[1] Fraser i. 162. Johnston *v.* Pasley, M. 13916.—[2] Hogg *v.* Gow, 27th May 1812.—* See above, p. 59.

prescription says of obligations generally, "The party to whom the obligation is made, that has interest therein, shall follow the said obligation within the space of forty years, and take document thereupon. And if he does not, it shall be prescribed and be of no avail, the said forty years being run and unpursued by the party."[1] Prescription runs from the day when fulfilment of the obligation became exigible; it is effectual in all cases of debt, bonds, provisions in marriage-contracts, &c., and even to elide a right to challenge the validity of a deed, provided the challenge be on ground extraneous to the terms of the deed, as that it was granted on deathbed, &c.[2] (*See above*, p. 97.)

Interruption.—The long prescription may be interrupted, 1*st*, Judicially, by action raised and called in court for performance of the obligation before the expiry of the forty years; 2*d*, By a new document or acknowledgment of the debt, or by a partial payment or payment of interest, which is expressly referrible to the debt in question. Prescription thus interrupted ceases to run, and will no more affect the obligation than if it had not been in course of completion. From the moment when the interruption ceases a new course of prescription will commence.[3] A mere citation may be employed to interrupt prescription, but it must be renewed every seven years, if not carried farther.[4]

Suspension.—Prescription can only be interrupted by the act of the person against whose claim it is running. It may be suspended, however, on account of his inability to act. Suspension of prescription takes place during minority; and so, if the person having a claim have been twenty years a minor, he cannot lose his claim by the negative prescription in less than sixty years.[5] Where the price of lands sold by judicial sale had not been paid, the effect of prescription in favour of the purchaser was not elided by the circumstance of some of the creditors being in minority.[6] A similar suspension is said to take place in all cases where the creditor is physically disabled from acting. This may occur from idiocy or madness, or from imprisonment in a foreign country. Prescription against a wife's claim on her marriage-contract is suspended during the existence of her husband.[7]

---

[1] 1469, c. 28.—[2] 1617, c. 12. E. iii. 7, 7, 8, 9.—[3] E. iii. 7, 38-43.—[4] 1669, c. 10.—[5] E. iii. 7, 35-37.—[6] Allan *v.* Brander, 8th March 1839.—[7] E. iii. 7, 35-37.

SECT. 2.—*Triennial Limitation.*

The long prescription is simply the extinction of a right because the holder has not made use of it within a certain defined period. The short prescription, or, more properly speaking, Limitation, is an exclusion on the ordinary means of proving the obligation; and as it is said to proceed on the presumption of the obligation being fulfilled, it admits of no interruption or suspension.

The triennial prescription, or limitation of the existence of an obligation to three years, applies to the greater portion of the debts contracted in ordinary business without a written obligation. Under this head may be classed debts to merchants by account, whether for providing goods by wholesale to dealers or by retail to private families; accounts for aliment or board; accounts of law-agents; accounts for medical attendance, &c.[1] It has been held to include a factor's fee for uplifting rents, and general management; but not advances of money, travelling charges, and official fees, nor goods consigned between merchants in different countries.[2] Accounts for inserting advertisements in a newspaper have been held to come under this prescription.[3]

Prescription does not begin to run until the date of the last article; so after an account has been incurred, any addition to it within three years will act like an interruption of the long prescription.[4] New entries, however, though between the same parties, if they be on a separate account, and on a different matter of employment, cannot be counted.[5] But where a law-agent was employed in several separate actions by the same party, and his accounts were divided into corresponding branches, it was held that the whole made one course of employment, and that prescription did not begin to run till the close of the whole.[6] It did not break the continuity of a law-agent's account, that he was for a while a partner with another, and that the account for that period was rendered in the partnership name.[7] It is held that if the debtor die within the three years, the prescription does not run.[8]

---

[1] 1579, c, 83. E. iii. 7, 17.—[2] Grubb *v.* Porteous, 3d March 1835. Moncrieff *v.* Durham, 26th May 1836.—[3] Robertson and Fyfe *v.* Contributors to National Monument, 7 July 1840.—[4] E. iii. 7, 17.—[5] Campbell *v.* Jolly, 20th May 1824.—[6] Elder *v.* Hamilton, 15th May 1833.—[7] Torrance *v.* Bryson, 5th December 1840. See Barker *v.* Kippen, 29th May 1841.—[8] Auld *v.* Aikman, 7th July 1842. See Ross *v.* Guthrie, 11th November 1839, where the heirs' oath was allowed where the debtor died within three years.

The alimentary allowance by the father for the sustenance of a natural child does not come within the clause of the act applicable to other alimentary debts.[1] In alimentary accounts, each year's charge runs a separate course of prescription. The same takes place as to servants' wages, which prescribe in three years (*see above*, p. 257), and as to rents of houses where there is no written lease.[2]

Where an action had been brought and dismissed as incompetent, it was found not to interrupt the triennial prescription;[3] and it would appear that there is no judicial interruption to this limitation (which presumes payment), unless by the commencement within the three years of the action which is finally successful.

Writ or Oath.—The triennial prescription does not extinguish the obligation; it merely deprives the creditor of any means of making it good against the debtor, except two which are mentioned in the act, viz. the oath of the debtor admitting resting owing, or a writing under his hand from which the continuance of the debt is inferred. The oath which can be administered embraces the *constitution* of the debt, and the *subsistence* of it; whether it was incurred? and whether it has or has not been paid? If the debtor admit the furnishing in his oath, and a payment to account, he will not be absolved by maintaining that the sum so given was sufficient payment, if there be means of estimating the real extent of the debt.[4] Where the party admits that the debt was incurred, and pleads, not that it was paid, but that it was compensated, prescription is elided, and an inquiry is opened as to the compensation.[5] If, however, the debt be specifically denied, it cannot be proved by ordinary evidence.[6] The oath of the wife may be appealed to where her husband has incurred a debt for such furnishings as come under her management, and the oath of any person having the sole management of a concern may be referred to in the same manner.[7]

Arrestments now prescribe in three years. (*See below*, p. 469.)[8]

SECT. 3.—*Miscellaneous Prescriptions.*

Quinquennial.—A prescription of five years takes place in

[1] Thomson *v.* Westwood, 26th February 1842.—[2] 1579, c. 83. E. iii. 7, 17.—[3] Cochran *v.* Prentice, 24th November 1841.—[4] Napier *v.* Smith, 14th December 1838.—[5] Mitchell *v.* Ferrier, 23d November 1842.—[6] Alcock *v.* Easson, 20th December 1842.—[7] 1579, c. 83, Tait on Evidence, 260-264.—[8] 1 & 2 Vict. c. 114, § 22.

all bargains concerning moveables or sums of money, which may be proved by witnesses, such as contracts of sale, letting and hiring, &c. Agricultural tenants are protected by it from demands for rent if not pursued for within five years after removal from the lands on which the rent is due. Rights to multures and minister's stipend also prescribe in five years. This prescription, like the former, leaves the obligation open to proof by the writ or oath of the party, and thus it does not apply to written bargains.[1] The quinquennial prescription does not run against minors.[2]

Vicennial.—Holograph obligations (*see above*, p. 139), if not attested by witnesses, prescribe in twenty years. The oath of the debtor may however be appealed to, not for establishing the original obligation, but simply the verity of the writing as holograph of himself. This prescription does not run against minors.[3] A service of an heir prescribes in twenty years. (*See above*, p. 100.)

Decennial.—Actions on the ground of the transactions between tutors or curators, and their wards, on either side, prescribe in ten years after the expiry of the guardianship. (*See above*, p. 38, *et seq.*)

Septennial.—The operation of certain cautionary obligations is limited to seven years. (*See above*, p. 217.)

Sexennial.—Bills of exchange and promissory notes prescribe, as documents of debt, in six years. (*See above*, p. 331.)

CHAPTER IV.

Small Debt Actions.

It is not within the scope of the present work to describe the forms of Process in the Courts of Law. Such a department could afford no serviceable instruction to unprofessional persons, and a treatise on this branch of the law, from which practitioners could acquire any instruction, or in which they would find any thing beyond those general rules of practice with which they must all be thoroughly acquainted, would occupy far wider limits than can be spared.

---

[1] 1669, c. 9. Hunter *v.* Thomson, 29th June 1843.—[2] 1669, c. 9. E. iii. 7, 20.—[3] Ibid. 26.

In these circumstances, it may seem inconsistent with the general plan of the work to give an account of the practice under the small debt acts. But as the procedure in these courts is exceptional to the ordinary rules of practice, and not discussed in the books set apart for the examination of the forms of courts,—as one of the acts gives jurisdiction to persons who may not be practically bred to the law, and as it is intended that both of them should be appealed to without the intervention of legal advisers, there seemed to be a sufficient reason for giving a digest of the acts on this occasion.

SECT. 1.—*General Principles.*

By these acts, a summary and exclusive jurisdiction is vested in Sheriffs and Justices of peace respectively. There is no recourse from their judgments to a higher court, unless in the special circumstances in which a sheriff's decision may be appealed against to the Court of Justiciary; but if the statutory jurisdiction be exceeded, or any thing irregular or illegal be done, the Court of Session will interpose by suspension or reduction,—as where a clerk allowed warrant of poinding to be extracted without a precedent charge,[1] and where the justices allowed a record to be made up with written pleadings in contravention of the act.[2]

It has been held that compliance with the terms of the Acts is a matter of public policy, and that parties may not dispense with it of consent—as by assenting to the question being discussed by written pleadings.[3] It is difficult to say how far the circumstance, that the foundation of the debt is palpably illegal, will be a foundation for a suspension or reduction of the proceedings, because it is difficult to draw a line between such cases and those where the judges are merely wrong in point of law—a defect which admits of no remedy in a higher court. A suspension was passed on a decree of the justices for one quarter's aliment of a bastard child, the paternity never having been established against the person decerned against.[4] A decree of the justices for the contents of a procurator's account, for conducting a case in their court, was suspended, it being contrary to the terms of the statute to act by procuration.[5] Lord Meadowbank in this case made the remark, "I apprehend the meaning of the

[1] Munro *v.* Dick, 21st June 1839.—[2] Miller *v.* M'Callum, 1st Feb. 1840.—[3] Ibid., 14th November 1840.—[4] Lindsay *v.* Bar, 23d June 1826.—[5] Miller *v.* M'Callum, 14th November 1840.

small-debt act was, to confer on justices jurisdiction in actions of debt for which there was a legal origin. The proper course is for the court to instruct the justices what cases they have a right to entertain."

Some of the errors of the justice of peace small-debt courts have arisen from their attempting to exercise, in the administration of the small-debt act, the powers conferred on them by other statutes. A case having occurred in which the justices decerned against a pawnbroker for the value of a pledge improperly withheld, without the special form of the pawnbrokers' acts having been adopted, the proceeding was with some hesitation sanctioned by the court;[1] but on the recurrence of a like informality, it was found necessary to check it by suspension.[2] By a special act, arrestment of wages in dependence of the action is abolished in cases under the small-debt acts.[3]

SECT. 2.—*Sheriff Courts.*

Actions for small debts in the sheriff courts are regulated by the statute 7th Wm. IV. and 1st Vict. c. 41. The amount for which such action may be brought is limited to £100 Scots, or £8, 6s. 8d. It is competent in all demands of civil debt, including rents and statutory penalties; and the action may be instituted where the original debt exceeds £8, 6s. 8d., provided the excess be departed from (§§ 2, 4, 5). Where actions for the sum so limited are pursued in the ordinary form, the judge may limit the expenses to such as are allowed by the act in small debt cases (§ 36). Such cases may be removed with consent of the pursuer from the sheriff's ordinary court to the small debt department, either when the original claim does not exceed the sum limited, or when it is reduced to that amount in the course of the proceedings (§ 4).

Actions of Multiplepoinding may be raised under the act, for the division of any sum not exceeding £8, 6s. 8d. among several claimants (§ 10).

Warrants may be issued for citing witnesses, transferable from county to county by indorsation; and any witness not appearing after a citation of forty-eight hours, is liable to a penalty of 40s. unless he have a valid excuse (§ 12).

A party who does not appear personally or by a friend, is held to have abandoned his case, unless a good excuse

[1] Henderson *v.* Wilson, 18th January 1834.—[2] M'Connell *v.* Scott, 21st November, 1840.—[3] 8 & 9 Vict. c. 39.

for delay be stated, when proceedings may be adjourned (§ 15). The parties are heard and examined verbally, and no law-agents are permitted to act for them, nor can any of the proceedings be committed to writing without leave from the Sheriff on special cause shown (§ 14). When a defender is decerned against in absence, he may re-open the question by lodging the expense incurred and 10s. at any time before a charge on the decree, or within three months after a charge if it has not been enforced. Where the pursuer has decree of absolvitor passed against him in absence, it may be re-opened by his paying 5s. with expenses. The expenses in either case go to the opposite party, unless otherwise specially disposed of by the court (§ 16). The Sheriff may direct sums decerned for to be paid by weekly, monthly, or quarterly instalments (§ 18). The decrees of Sheriffs may be enforced by endorsement beyond their jurisdictions (§ 19). The Sheriff may enforce his decision by poinding, and if access be denied, he may grant warrant of open doors.[1] Each Sheriff must hold circuit courts at certain places mentioned in schedule H. of the act, so often in each place as he is directed by warrant under the sign-manual published in the London Gazette (§ 23). Each sheriff-clerk must attend the circuits or appoint a depute, and there must be a resident depute for each circuit court to issue summonses, the name and residence of such depute being advertised on the door of the parish church (§ 25). A description of the space allotted to the jurisdiction of each circuit court must be posted up in every court-room of each county (§ 26). The act appoints a table of fees, of which a copy must be printed on each summons, and on each service copy, and be hung up in each sheriff-clerk's office, and in every court-room during the holding of a small debt court, under a penalty not exceeding 40s. (§ 33). There can be no review of the Sheriff's decisions except on the ground of corruption, malice, wilful or mischievous deviation from form, or the incompetency of the procedure. The appeal lies to the circuit court, or where there is no circuit to the high court of justiciary (§ 31). It was found that an appeal on want of jurisdiction, from the defender not being within the county of the Sheriff adjudicating, should have been to the circuit court, not to the Court of Session.[2] Officers not performing their duty as assigned by the act, are liable in a penalty not ex-

[1] Scott *v.* Lethem, 27th June 1844.—[2] Graham *v.* Mackay, 25th Feb. 1845.

ceeding 40s. (§ 34). In the clause of the act allowing prosecutors to recommence procedure only in the small debt court, the words of the act are "when absolvitor has passed." It appears that where parties have not come to issue, that there has been in some counties a practice of "dismissing the action" instead of pronouncing decree of absolviter, and that in such a case the pursuer is not precluded from raising action before another court.[1]

SECT. 3.—*Justice of Peace Courts.*

These are regulated by 6th Geo. IV. c. 48. The jurisdiction of the justices is more limited than that of the Sheriff; it only extends to cases where there is a debt or demand not exceeding £5 (§ 2.) It does not extend to questions where heritable right, or wills, or marriage-settlements are involved, or to questions arising out of horse-racing or gaming (§ 25). The warrants are issued by the clerk of the peace, or a deputy appointed by him.* It was found that where a party holding a deputation from the town-clerk of a borough was in use to act as clerk to the magistrates when acting in the small debt court, a warrant issued by him was incompetent.[2] Where the defender does not appear on the first court-day to which he is cited, he may, on the authority of a marking on the warrant or an entry in the procedure-book, be cited again, being held to confess the debt if he do not appear on such second citation. If the first citation have been twelve free days from the court-day, the officer, if he have not personally served it on the defender, may cite him a second time to the same court-day; and the defender not appearing in consequence of such double citation is held as confessed (§ 3). Witnesses not attending when cited are liable to forfeit 20s., or be imprisoned for ten days (§ 4). The decisions of the justices are not subject to Appeal, nor are they subject to Reduction except on the ground of malice and oppression, in which case action must be brought within a year of the date of the decree (§ 14). Two justices must be present to form a judicial quorum, but one justice can pronounce decrees in absence (§§ 2, 16). The procedure in other respects resembles that before the Sheriff. There is a separate table of fees. It was found to be irregular and illegal for the

[1] Taylor *v.* Coulston, 18th February 1840.—* Sect. 3.—[2] Harvey *v.* Forrest, 25th November 1841.

clerk to give a discount on the regular fees to parties taking out numerous complaints, who, the full fees being indorsed on them, were enabled to receive their amount from the defenders.[1]

CHAPTER V.

Diligence against the Person, and Imprisonment.

Sect. 1.—*Preliminary Explanation.*

Diligence is a general expression, indicating the means by which the law enforces the obligations of individuals, through indemnity on their property, or the restriction of their liberty. It proceeds either on the decree of a competent court, or on that which the law expressly declares to be equivalent.

Clause of Registration.—The previous consent of parties assumes the force of a decree when it is in the form of a Clause of Registration in a deed, prepared according to certain forms.* There is a blank left in the deed for the name of a Procurator, who is presumed to appear in court, and "consent to the registration" on the part of the person bound. When such a deed is presented at the proper office, it is registered, and an extract is given with the procurator's name filled up, which is of the same service in the hands of the claimant as a decree of the court in his favour.[2]

Bills and Notes.—It is among the privileges of bills of exchange and promissory notes, when properly made and duly negotiated, that they are in the same situation with deeds having a clause of registration. To give it this privilege the bill or note must be duly protested, and the protest must be recorded within the proper time in the books of some court competent to try an action for payment of the document.†

Induciæ.—The nature of the induciæ, an expression it is necessary frequently to employ, may here be explained. The term is applicable to a truce or cessation of hostilities, and expresses the period intervening between the charge and the

---

[1] Lord Advocate *v.* Douglas, 4th June 1842.—* See above, pp. 133, 337.—[2] E. ii. 5, 54.—† See above, p. 334.

denunciation according to the old, or between the charge and the time when it must be obeyed to save the party from ulterior proceedings according to the new system. The number of days for clauses of registration, bills of exchange, and decrees of removing by the Sheriff is six, in charges on decrees of the commission of teinds it is ten, in other cases it is fifteen. Where the debtor resides in Orkney and Shetland, however, it is forty (unless he have consented to shorter induciæ), and when he is out of Scotland it is sixty days.[1]

A considerable alteration has lately been made in the form of diligence. The power of imprisonment has been extended to sheriff courts, and the steps by which it is accomplished in the Court of Session have been considerably abbreviated. As it is still competent, however, to proceed in the old form,—though in such case no part of the expense is exigible from the obligant but the expense of extract, unless it be shown that it is incompetent in the circumstances to proceed in the new form,[2]—a brief detail of the old form is here given.

SECT. 2.—*Old Form of Diligence.*

The process commences with Letters of Horning, or Letters of Horning and Poinding, which are writs signed by writers to the signet, and stamped with the signet, authorizing messengers-at-arms to charge a party to perform a specified act, under pain of being denounced rebel if he fail to obey, and containing a warrant so to denounce him. When the letters proceed on a decree of the Court of Session, or on a document registered in its books, the extract is in general a sufficient warrant for impressing the signet. When they proceed on the decree of an inferior court, the decree must be produced, and authority to proceed on it granted by bill.[3] The letters are executed by a messenger-at-arms personally or at the dwelling-house of the party if he be within Scotland,—if he be not, a copy is delivered at the Register House.[4]

An execution is returned by the messenger. At the end of the induciæ, the debtor, if contumacious, may be denounced rebel, or put to the horn, and his moveables may be poinded. According to ancient practice the messenger in denouncing proceeds to the market-cross of Edinburgh, or of the head

[1] Jur. St. iii. 577.—[2] 1 & 2 Vict. c. 114, § 8.—[3] Jur. St. iii. 576.—[4] 6 Geo. IV. c. 120, § 51.

burgh of the shire, and in presence of two witnesses, pronounces the denunciation, and gives three blasts of a horn. Very little (if any) of this ceremony was in use to be performed for a considerable period before the introduction of the new system, the messenger merely returning an execution, stating that it had been gone through.[1] The denunciation must take place within a year and day of the date of the charge,[2] and the letters of horning and execution must be registered within fifteen days after the date of the denunciation.[3] The next step is a warrant to imprison, which is thus obtained: The letters of horning, with the execution, a certificate of their having been duly registered, and a bill praying for letters of caption, are produced at the bill-chamber; and the bill, when passed, is a warrant to the keeper of the signet to stamp a caption or warrant of imprisonment.[4]

SECT. 3.—*New Form.*

Superior Courts.—By the new practice, when there is a decree of the Court of Session, or of the Commission of Teinds, or of the Court of Justiciary, or a registered document on which execution may proceed,* an extract may be procured, containing a warrant to charge the debtor or obligant to pay or perform the obligation within the induciæ under pain of poinding and imprisonment. On this warrant a messenger-at-arms charges the party as above, in presence of one witness, and returns an execution signed by himself and the witness.[5] On the expiration of the *induciæ*, the messenger may proceed to poind.[6] At any time within year and day after the expiry of the charge, the extract and execution may be recorded in the register of hornings, and it will then have the same effect as recorded charge and denunciation on letters of horning.[7]

Sheriff Courts.—Extracts of decrees of Sheriffs, or of documents on which execution may proceed registered in the sheriff court books, are to contain warrants in the same terms as the above, and having the same effects. The fees for such extracts are not to be greater than those established for ordinary extracts. The warrant may be executed by a messenger-at-arms or an officer of the court.[8] The extract and execution may be registered by the sheriff-clerk at any

[1] Office of a Messenger, 162. Darling on the Powers of Messengers, 15. Jur. St. iii. 737.—[2] Office of a Messenger, 162.—[3] Jur. St. iii. 737.—[4] Ibid. 740.—* See above, pp. 133, 337, 454.—[5] 1 & 2 Vict. c. 114, §§ 1, 3.—[6] Ibid. § 4.—[7] Ibid. § 5.—[8] Ibid. § 9, & Sch. No. 6.

time within year and day as above, having then the effect of recorded charge and denunciation.[1]

A person who has acquired right to an extract on which diligence is competent, may have it executed in his own favour. If it is recorded in the books of the Court of Session he presents it (with any proceedings that may have followed on it, together with a minute indorsed on it by a writer to the signet, and the evidence of his title) in the bill-chamber, and there obtains authority to arrest, charge, poind, or imprison, according to the extent to which the original diligence may have proceeded.[2] If the extract was issued from a Sheriff Court, the authority is obtained in a similar manner, the minute being signed by the party or a procurator.[3]

In the case of the extract of a Sheriff Court, if the defender or his moveables be in another sheriffdom, a warrant of concurrence may be obtained by presenting a minute in the court of that sheriffdom, or in the bill-chamber of the Court of Session.[4]

SECT. 4.—*Warrant to Apprehend and Imprison.*

If the proceedings have issued from the Court of Session, on the execution as above, being recorded, the keeper writes a certificate thereof on the extract and execution, and warrant to imprison may then be obtained, by a writer to the signet indorsing a minute on the extract, and presenting it with the execution and certificate in the Bill-chamber, where, if all be in proper form, the clerk passes it, and the extract and deliverance become warrant to apprehend and imprison.[5] Where the process has issued from the Sheriff Court, a similar warrant may be obtained from the clerk, on a minute by the party or a procurator.[6] Where the charge has proceeded on a warrant of concurrence, as above described, the warrant to imprison may be obtained either from the court of the concurring Sheriff, or from the Bill-chamber.[7] If the debtor or obligant is in a different sheriffdom from that where the warrant to imprison is issued, a warrant of concurrence may be obtained in the Bill-chamber, or in the court of the other sheriffdom, on the warrant, with the extract, execution, and a minute praying for concurrence, being presented.[8]

Acts of Warding.—The magistrates of royal burghs have

---

[1] 1 & 2 Vict. c. 114, § 10.—[2] Ibid. § 7.—[3] Ibid. § 12.—[4] Ibid. § 13.—[5] Ibid. § 6.—[6] Ibid. § 11.—[7] Ibid. § 14.—[8] Ibid. § 15.

for centuries possessed the power of imprisoning debtors within their bounds, which was only extended to Sheriffs in 1838. The writ of imprisonment in this case is termed an Act of warding. The form generally bears that an officer has searched for moveables, in order to poind them, and has found none;[1] but search is not a necessary preliminary, and is not followed in practice.[2]

A warrant, if from the Court of Session is put into the hands of a messenger-at-arms, if from an inferior court into the hands either of a messenger, or of an officer of the court. The officer should apprehend the individual according to form, with his blazon displayed, and exhibiting his warrant. According to strict practice a messenger touches the debtor with his wand of peace, which is provided with a moveable ring, the sliding of which from one part to the other is a protest that the officer has been resisted or deforced. It is said that if any of these ceremonies be omitted an officer may be lawfully resisted.[3] A messenger is not bound to convey his prisoner immediately to jail. He may convey him to any private dwelling or other place where he may wish to have communication with his friends; but the messenger is, in the mean time, liable if he escape, and cannot convey him to any other place but the nearest prison except at his own request.[4] The warrant or a charge on it must be left with the gaoler as his authority for detaining the debtor.[5]

No person can be imprisoned for a debt not exceeding £8, 6s. 8d., exclusive of interest and expenses, incurred after 9th September 1835.[6] Debts cannot be accumulated for the purpose of defeating the exemption, except where they are acquired by marriage or inheritance.[7] The exemption does not apply to statutory penalties, or other fines or forfeitures, or to taxes.[8] But it appears to be held that any sums levied in the shape of debt or damage, though under special statute, as the expenses occasioned by seamen deserting and sued for under the merchant seaman's act, come within the exemption.[9] The exemption has been found to apply to warrants *in meditatione fugæ* where the debt does not exceed £8, 6s. 8d.[10]

---

[1] B. C. ii. 538-543. Jur. St. iii. 569.—[2] Marshall *v.* Lamont, 8th March 1803, M. Burgh Royal, Ap. No. 14.—[3] Office of a Messenger, 5-7.—[4] B. C. ii. 544. Darling on the Powers of Messengers, 175.—Garden *v.* M'Coll, 13th December 1826.—[5] B. C. ii. 544.—[6] 5 & 6 Wm. IV. c. 70, § 1.—[7] Ibid. § 4.—[8] Ibid. § 5.—[9] M'Naughton *v.* Halbert, 29th November 1843.—[10] Marshall *v.* Dobson, 18th December 1844.

SECT. 5.—*Imprisonment.*

Responsibility for Safe Custody.—From an early period, the magistrates of the burgh where the prison is situated were responsible, along with the gaoler, for the safe custody of the prisoner, and bound to show that where a prisoner escaped, it had been by means which no foresight or energy on their part could control.[1] By the prison discipline act, this responsibility was abolished, while it is there enacted that "the funds hereby authorized to be raised or levied shall not be in anywise liable for the escape of any prisoner, but reserving action against the gaoler for any neglect as touching the custody of any such prisoner."[2] The members of the general and county boards are at the same time relieved from personal responsibility.[3]

Bill of Health.—When confinement in the gaol becomes seriously detrimental to the health of the prisoner he may be liberated on a "Bill of Health," on his producing a certificate on oath from a physician or clergyman, testifying "to the extreme danger of his life."[4] Provision must be made for the safe custody of the prisoner on his being so released, and sometimes security is required for his reappearance. "The creditor is cited as a party to the bill of health, and has it in his power to insist on such precautions as the case may admit; the magistrate being entitled to judge in the circumstances what it is fair for the creditor to require before the prisoner shall be liberated."[5]

Aliment and Act of Grace.—No gaoler can legally receive a prisoner for civil debt, unless ten shillings be deposited with him as security for the prisoner's aliment.[6] By the act of 1696, called the Act of Grace, a prisoner, on application to the magistrates, and proving his poverty, may have an alimentary sum awarded in his favour against the incarcerating creditors of not less than threepence per day. He must make oath of his inability to support himself. If the creditors do not within ten days provide aliment, or consent to the prisoner's liberation, the prisoner is discharged.[7] Aliment, according to the proportion which may be awarded, is debited against the ten shillings deposited.[8] Every prisoner claiming the benefit of the act of grace, must, if required, execute a disposition conveying his whole property

[1] B. C. ii. 545.—[2] 2 & 3 Vict. c. 42, § 18.—[3] Ibid. §§ 2, 13.—[4] A. S. 14th June 1671.—[5] B. C. ii. 550, 551.—[6] 6 Geo. IV. c. 62, § 1.—[7] 1696, c. 32.—[8] 6 Geo. IV. c. 62, § 2.

to his incarcerating creditors for behoof of all his creditors, and if required in writing so to do, he is not entitled to aliment till he comply.[1] By the late act, prisoners for debt, who choose to submit to the ordinary regulations of the prison in regard to work, are entitled to the usual prison diet.[2]

By the same act all prison fees were abolished from 1st July 1840.[3]

Sect. 6.—*Sanctuary and Exemption from Imprisonment.*

A debtor is protected from imprisonment within the limits of the sanctuary of Holyroodhouse. If caption is used, however, as a means not of enforcing the payment of money, but of compelling him to perform some legal obligation, it affords no protection. It is no protection to a debtor of the crown.[4] The debtor is only protected for twenty-four hours, unless he get his name entered in the record of the Abbey Court, and procure a certificate.[5] Persons concealing property, and taking refuge in the sanctuary, are considered fraudulent debtors, and as such may be apprehended.[6]

When the presence of the debtor is necessary in a court of justice, the warrant on which he is produced will contain a personal protection.[7] As diligence cannot be executed on Sunday, debtors may with safety leave the sanctuary on that day. If a debtor is fraudulently induced to leave the sanctuary, the creditor who has perpetrated the fraud will be barred from taking advantage of it.[8]

Minor pupils are not liable for imprisonment for debt (*see above*, p. 42), nor are wives living in family with their husbands (*see above*, p. 26); but it was found that where a husband had left the country in bankrupt circumstances, and his wife carried on business on her own account, she was liable to diligence for debts contracted after his departure.[9] The members of the House of Lords and the Peers of Scotland are privileged from arrest for civil debts; and members of the House of Commons are privileged for forty days after the prorogation of Parliament, and forty days before its reassembling.[10] As to personal protection, in mercantile sequestrations, *see* p. 393, and in cessios, p. 422.

---

[1] 6 Geo. IV. c. 62, § 7.—[2] 2 & 3 Vict. c. 42, § 22.—[3] 2 & 3 Vict. c. 42, § 19.—[4] E. iv. 3, 25.—[5] B. C. ii. 572.—[6] E. iv. 3, 25.—[7] B. C. ii. 572.—[8] Ibid.—[9] Churnside *v.* Currie, 11th July 1789, M. 6082.—[10] Blackst. ii. 165.

SECT. 7.—*Imprisonment on Meditatio Fugæ Warrant.*

In the ordinary case a person cannot be arrested for civil debt unless on the decree of a court, or on the registration of a document declared by law to place the party bound by it in the same position as if a decree had issued against him. (*See above*, pp. 337, 426.) There is an exception, however, in the case where presumptive evidence can be produced that the debtor is about to quit the country. He is then said to be *in meditatione fugæ*, and the authority by which he is arrested is termed a *meditatio fugæ* warrant.* The debt does not require to be established by a document, nor is it necessary that it should have been contracted in Scotland.[1] The warrant may be granted though the debtor be in the sanctuary, if he be about to leave Scotland; in the case where this was found the warrant was obtained from the bailie of the Abbey.[2] It is not sufficient to justify the warrant that the debtor intends to leave one part of Scotland for another.[3]

The warrant is obtained from a justice of peace or other magistrate on the creditor's oath. If the creditor be in a different part of the country from the debtor, he may make an affidavit and transmit it to a mandatary or agent, who, before a warrant is granted, should be directed to make oath of his belief that the debtor meditates flight. The warrant, if granted by a sheriff, may now be executed over any part of Scotland by a messenger-at-arms, or an officer of the court whence it is issued.[4] The oath of the creditor must distinctly specify the debt, and the circumstances from which he argues that the debtor meditates flight. The magistrate must act on his discretion, and must make use of any evidence which is accessible. If the result of the creditor's statement and of any other procurable information be that he sees no reason to believe there is a design to escape, he should dismiss the application. If he forms an opposite conclusion, he grants warrant for bringing the debtor before him. The debtor is examined. If he admit his intention to escape, the magistrate's duty is clear. If he deny it, he is allowed to bring forward any evidence in his favour which may be at

---

[1] Tait's J. P. 312, 313.—[2] M'Ra *v.* Macartney, 7th Feb. 1832.—[3] Laing *v.* Watson, 20th December 1789, M. 8555.—[4] 1 & 2 Vict. c. 119, § 25.

* Until lately in England a debtor could be arrested in *mesne* process, or before judgment had passed against him, on the plaintiff making affidavit against him of a debt amounting to £20. (Bl. iii. 287. 7 & 8 Geo. IV. c. 71.) By a late act, however (1 & 2 Vict. c. 110), a practice, resembling in principle that which has long existed in Scotland, has been established. See above, p. 417.

hand.[1] The strictest caution is incumbent on all parties. "On the one hand," says Mr Tait, "a justice who proceeds *malâ fide*, or irregularly, in granting such a warrant, may be subjected in damages to the debtor, the creditor being also liable in such a case; and being also liable in circumstances which may not subject the judge, *e. g.* where he swears falsely to a debt, or to such facts as may constrain a judge, with no opportunity of seeing them refuted, to issue a warrant; but where a justice judges fairly, and to the best of his powers judicially applied to the circumstances proved before him, he will not be liable in damages any more than in ordinary cases where he is called on to judge of evidence. On the other hand, if a judge obstinately refuse a warrant where the *meditatio fugæ* is sworn to, and is justified by manifest proof of an intention to escape, and if the debtor escape, the justice may be subjected in damages."[2] The debtor is liberated on his finding caution to abide the result of any action founded on the debt which may be raised within six months (*see above*, p. 229); and if he do not find caution he must be liberated at the end of six months if no such action be raised.[3]

It has been found that a *meditatio fugæ* warrant cannot be granted for a debt not exceeding £8, 6s. 8d. *See above*, p. 458.

CHAPTER VI.

Proceedings for Attaching Moveables.

Sect. 1.—*Personal Poinding.*

The preliminaries of personal poinding are described above as introductory to the issuing of a writ of imprisonment. Poinding is the seizure and sale of the moveable goods of the debtor at the expiration of the days of charge as above. It may be executed by the officer in virtue of the extract, or on warrant in favour of a person acquiring title, or on warrant of concurrence, as above described. (*See* p. 456).[4] It may include not only the original debt, but the expenses of the poinding.[5] The officer proceeds to the spot, and, accompanied by two sworn valuators, who act also as witnesses,

[1] Tait's J. P. 315.—[2] Ibid. 311.—[3] Ibid. 316, 317.—[4] 1 & 2 Vict. c. 14, § 4.—[5] M'Neill *v.* M'Murchy, 13th February 1841.

declares the property to be attached for behoof of the creditor, and leaves it with those in possession, to whom he gives a schedule, specifying the effects, their value, and the person at whose instance they are pointed. The officer, if required to do so before the pointing is completed, must conjoin in it any other creditor who produces a warrant.[1] He must report the pointing to the sheriff, specifying the authority under which he acts; the names and designations of the debtor and creditor, of the valuators, and of the person in whose hands the goods remain; the delivery of the schedule; and the value of the goods. This must be done within eight days, unless it be shown that it could not be accomplished within that period.[2] On receiving the report, the sheriff, if necessary, gives orders for the security of the goods, and if they be perishable, for their immediate conversion into money. In the ordinary case, he will grant warrant (if required) for their sale by auction, at the sight of a judge appointed by him, and at such time and place, and with such advertisement as may seem expedient. The sale must not take place before eight or after twenty days from the date of the advertisement.[3] Either the day of publication or the day of sale may be included in the eight, and so of a sale on the 18th of the month, sufficient publication was found to have been given on the 10th.[4] A warrant of sale not fixing the day is illegal.[5] The sheriff orders a copy of the warrant to be served on the debtor, and on the person in possession of the goods—if he be a different person from the debtor, six days before the day of sale, unless in the case of perishable effects.[6]

The articles are to be sold at upset prices not less than the appraised values, and if there be no bidding, they are to be handed over to the poinder to the extent of his debt, interest, and expenses, according to the appraised value, subject to the legal claims of other creditors.[7] Within eight days the judge reports the sale or delivery to the Sheriff; in the former case lodging with the sheriff-clerk the roup-rolls or certified copies, and an account of the proceeds, which the sheriff directs to be paid to the poinder to the extent of his debt, &c., as above. These documents must be patent to all concerned on payment of the fee of one shilling.[8] The poinder or any other creditor may bid.[9] Any person intro-

[1] Maclaurin's Form of Process, 334. 1 & 2 Vict. c. 114, §§ 23, 24, 25, 32.—[2] 1 & 2 Vict. c. 114, § 25.—[3] Ibid. - [4] M'Neill *v.* M'Murchy, 13th February 1841.—[5] Kewley *v.* Andrew, 18th March 1843.—[6] 1 & 2 Vict. c. 114, § 26.—[7] Ibid. § 27.—[8] Ibid. § 28.—[9] Ibid. § 29.

mitting with or carrying off the poinded effects is liable, on summary complaint to the Sheriff, to be imprisoned till he restore them, or pay double the value.[1]

SECT. 2.—*Poinding of the Ground.*

Poinding of the ground is a process by which the superior was in use to exact payment of his feu-duties. It has long been available to the holder of any real security, such as an heritable bond, for attaching the moveable goods of the proprietor, and of his tenants to the extent of any rent which may be due by them. "This action is competent to an annualrenter for the arrears of interest due upon his infeftment, to a superior for his feu-duties, or for the retoured duties due to him before citation of his vassal's heir in an action of declarator;* and, in general, to all creditors in debts which constitute a real burden or lien upon lands. But it is not competent to proprietors, nor even to possessors, though not strictly proprietors, as adjudgers, liferenters, or other real creditors, who possess under their different titles; for there is a natural impropriety in poinding the ground of lands possessed by the poinder himself."[2]

The proceedings may be conducted either before the Court of Session or the Sheriff. The proprietor of the lands and his tenants are the parties called. When a decree is obtained, letters of poinding are issued, which authorize a messenger to poind and distrain the moveables, which are afterwards sold by warrant of the Sheriff. As there is no personal conclusion in the summons against any party, no personal charge is necessary.[3]

SECT. 3.—*Landlord's Sequestration for Rent.*

The process by which the landlord converts the goods over which he has an hypothec into a real pledge, and gets them sold for the rent, is termed Sequestration. After the term of payment the landlord can sequestrate for sale. Before the term of payment he can, on good cause shown, sequestrate for security. The process commences by a petition to the Sheriff, or the magistrates of the burgh, praying for a warrant "to inventory and sequestrate the whole corns, cattle, household furniture, and other effects, and to roup as much as will pay the rents and expenses of sequestration and roup, and

[1] 1 & 2 Vict. c. 114, § 30.—* See above, p. 53.—[2] E. iv. 1, 11.—[3] Ibid. 12, 13. R. L. i. 385, *et seq.*

the residue to remain under sequestration until farther orders."[1] The judge having granted the warrant, the proper officer executes it, taking a specific inventory of the subjects. This inventory is the only legal evidence of what has been sequestrated.[2] A legal attachment of the effects is thus created, and the tenant intromitting with them is liable to imprisonment for breach of sequestration; but he remains administrator, and is entitled even to consume sequestrated produce for the ordinary support of the farm-establishment, —to feed the servants and cattle.[3] The petition, in as far as it contains a warrant to sell, will be intimated to the tenant; and a reasonable period is allowed him, after which, if he do not appear, or, appearing, do not state a sufficient defence, a warrant is granted, vesting the landlord, or a third party, with power to sell, which is carried into execution under the eye of the clerk of court. In accounting for the returns the landlord is entitled to deduct expenses.[4]

In sequestrations under the small debt act,* there are special regulations for the sale of the effects, and the notice to be given to the tenant.[5]

SECT. 4.—*Crown's Extent.*

Extent is a diligence, introduced from the law of England, to enable the crown to seize the property of its debtor preferably to all other creditors. In England it is applicable to the real or heritable estate, in Scotland only to the moveable.[6] It is generally employed for the recovery of the arrears due by the collectors of the revenue. It proceeds on a Fiat issued by the Judges in Exchequer, directing the Sheriff to inquire as to all the moveables, debts, and sums of money belonging to the debtor, and to seize the moveables and money, so that he may sell the goods to the extent of the debt, and return the proceeds to Exchequer;—to enable him to accomplish this, a second writ is issued, called "*venditioni exponas.*" This department of the process is called an "extent in chief of the first degree." Where the Sheriff's inquisition discovers debts due to the king's debtor, an "extent in chief in the second degree" is granted—on an affidavit of the insolvency of the debtor—against *his* debtor. The procedure is similar to the extent of the first degree, and, where necessary, extents may proceed in the third and fourth degree.[7]

[1] H. on L. & T. ii. 405.—[2] Ibid.—[3] Ibid. 411.—[4] Ibid. 413. A. S. 11th July 1839. * See above, p. 449.—[5] 7 Wm. IV. and 1 Vict. c. 41, § 20.—[6] 6 Anne c. 26, § 8. Tidd's Practice of K. B. & C. P. 1043.—[7] Tidd's Practice of K. B. & C. P. 1044-1048. B. C. ii. 41, *et seq.*

The application for extent must be accompanied by an affidavit called an "affidavit of danger," setting forth the debt and the danger of loss. Where there is a bond the extent is granted on its simple production with the affidavit. Where there is no bond, a commission is issued for commissioners to take inquisition by the oaths "of good and lawful men," and on the testimony of witnesses. The distinction is derived from the practice of the law of England, in the phraseology of which the debt must be "matter of record."[1] The writ is tested in the name of the Judge in Exchequer, signed by the Queen's Remembrancer, and sealed with the Exchequer seal. The security is real on the goods from the date of this operation, which is termed the "*teste*."[2]

An Extent in Aid is a process by which the king's debtor may obtain a preference over the property of a person indebted to him. It may be obtained by one against whom an extent in chief may be issued, or by one who is pursued as surety for a collector of the revenue. There are various provisions for preventing this process from being abused. If the sum due to the debtor of the crown exceed what that debtor is himself due, the extent is restricted to the amount, and the proceeds are paid over for the service of the crown.[3] It is competent in the general case only to collectors of duties, to bankers or others receiving taxes in deposit, to farmers of duties, and to individuals who have to account for duties at stated intervals. One may always obtain an extent in aid to recover a debt which he is himself bound to pay over to the crown.[4]

SECT. 5.—*Arrestment; its Nature and Application.*

Arrestment may be described as a process by which a person, who has in his possession moveables belonging to another, or is owing him money, is prohibited from parting with the goods, or paying the debt, until a debt due or alleged to be due by the person to whom he owes the money, or whose property he holds, to the person who uses the diligence, is paid or secured. The subject arrested must be virtually out of possession of the arrester's debtor, and in the possession of another person, and so no arrestment can take place in the hands of a servant, clerk, or steward as to the property of his employer,[5] or in the hands of a hirer of a

[1] Tidd's Practice of K. B. & C. P. 1044, 1050.—[2] Ibid. 1047, 1053.—[3] 57 Geo. III. c. 117, § 1.—[4] Ibid. § 4. B. C. ii. 48-50.—[5] Cuningham v. Home, 18th November 1760, M. 747.

furnished house as to the furniture.[1] Arrestment cannot be used in the hands of a person who is not directly responsible to the arrester's debtor, but who is responsible to one who may be in his turn liable to the arrester's debtor. On this principle it cannot be used in the hands of a factor "whose powers are limited to the receiving and disposing of the rents of a particular land estate,"[2] but it may be used in the hands of a commissioner having the general management of the affairs of one who is indebted to the arrester's debtor, or in the hands of a judicial factor, or of a private trustee for creditors.[3] Arrestment of property put into the arrestee's hands by one person, to be given to or used for behoof of another, will not be effectual to a creditor of the former.[4] An arrestment is not good in the hands of one who will have property of the debtor in his hands, but has not yet been put in possession of it, as in the hands of a consignee before the goods have reached him.[5] Arrestment may, however, be used in the hands of a trustee, or any other person bound to account, as being a debtor,[6] and a premium of insurance may be arrested by a creditor of the underwriter, in the hands of the broker, though not paid by the insurer, as the broker is personally liable.*[7] Arrestment is good in the hands of a carrier, and he is not bound to deliver to the party for whom they were originally destined, goods which have been arrested in his hands.[8]

The application of arrestment is properly confined to moveables, but heritable bonds may be arrested where no infeftment has been taken.[9] Alimentary provisions are not arrestable. Under this head have been viewed servants' fees, pensions, and salaries of public offices. "And, indeed, all salaries annexed to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, though they be granted not by the king, but by subjects, whether communities or private donors, ought on the same ground to be counted alimentary."[10] The wages of labourers and manufacturers, in so far as necessary to their subsistence, are declared by statute not to be arrestable.[11] By a special statute, arrestments *in dependence*, of any description of wages in actions

---

[1] Davidson v. Murray, 11th December 1784, M. 761.—[2] E. iii. 6, 4.—[3] Ibid. B. C. ii. 74.—[4] Stalker v. Aiton, 9th February 1759, M. 745.—[5] Ibid.—[6] Kyle's Trustees v. White, 14th November 1827. Lothian v. M'Cree, 27th November 1828.—* See above, p. 197.—[7] Pitcairn v. Adair, 7th February 1809.—[8] Matthew v. Fawns, 21st May 1842.—[9] 1661, c. 51. E. iii. 6, 6.—[10] E. iii. 6, 7.—[11] 7 Wm. IV. & 1 Vict. c. 41. § 7.

under the small debt acts is made illegal.[1] In interpretation of the general rule the following different kinds of provision have been found arrestable:—Ministers' stipends;[2] arrears due to an officer in the army, but not half-pay; a macer's fees, and dues payable to the principal keepers of the Parliament House;[3] the salary of an extractor of the Court of Session;[4] the salary of the rector of an academy;[5] the salary payable by the city of Edinburgh to the clerk of the Weigh-house.[6] The annuity provided to a schoolmaster's widow by compulsory contribution of schoolmasters, in virtue of an act of parliament, was found arrestable, as it was not declared by the statute to be alimentary.[7] An annuity of £1500 to a peer, declared in the settlement to be alimentary, and not arrestable, was held only arrestable for alimentary debts;[8] and in another case an annuity of £1800 held by a peer, was found not too high to be within the privilege of an alimentary allowance.[9] It is doubted whether those annuities, which are not like servants' wages in their own nature purely alimentary, are exempt from diligence by being merely declared to be alimentary, without a farther declaration that they are not to be liable to diligence.[10]

Periodical payments, such as rents and interests, may be arrested while the term for which they are payable is running, and before the day of payment arrives.[11] An arrestment on the term-day was held to carry only the rent then due, not that of the ensuing term.[12]

SECT. 6.—*When and how Arrestments may be obtained.*

There are two kinds of Arrestment;—Arrestment in Execution, and Arrestment in Security.

Arrestment in Execution.—The former is a method of enforcing payment of a liquid debt, that is of one already due. It proceeds, 1*st*, On a decree of the Court of Session, or of a Sheriff Court. In the case of the former it may proceed, according to the old practice, in virtue of letters of horning, or, according to the new practice, it may be embodied in the decree. If the former plan is adopted, no farther expenses are exigible from the debtor than those of the extract, unless

---

[1] 8 & 9 Vict. c. 39.—[2] Smith *v.* E. of Moray, 13th December 1815.—[3] E. iii. 6, 7, n. *.—[4] Miller *v.* Wilson, 11th July 1827.—[5] Murray *v.* Bell, 16th May 1833.—[6] M'Intyre *v.* Mackenzie, 29th May 1833.—[7] Irvine *v.* M'Laren, 24th January 1829.—[8] Multiplepoinding, Monypenny, 11th July 1835.—[9] Harvey *v.* Calder, 13th June 1840.—[10] Ibid.—[11] E. iii. 6, 9.—[12] Wright *v.* Cunningham, 23d June 1802, M. 15919.

it be shown that it was incompetent to proceed in the new form. The new form alone is applicable in Sheriff Courts, in the decrees of which warrant to arrest may be embodied.[1] (*See above*, p. 456). 2*d*, An arrestment may proceed on a document with a Clause of Registration, or which has otherwise the privilege of being registered for execution. (*See above*, p. 337.) It may be issued according to the old form, on Letters of Horning, under the conditions above stated, or, according to the new form, in virtue of a warrant in the extract of the recorded deed, from the Court of Session or the Sheriff Court.[2] 3*d*, Arrestment may proceed on special Letters of Arrestment, issued under the signet, granted on the production of a liquid ground of debt, *i. e.* a document, according to the terms of which the debt is exigible at the time when the letters are sought.[3]

Arrestment in Security may proceed, 1*st*, On letters of arrestment, issued from the Bill-chamber, on an obligation to pay a debt which is not yet due from the time not having elapsed, or the event on which it is payable not having occurred. 2*d*, During the dependence of an action in the Court of Session on letters obtained on production of the libelled summons, and, in the inferior court, on a warrant embodied in the summons, or separate.[4] 3*d*, By warrant, which may be inserted in summonses concluding for payment of a sum of money. In this case, and in arrestments on libelled summons, the arrestment may take place before the citation is given, but will not be effectual unless the citation be executed within twenty days after the arrestment.[5] By statute a sheriff's authority to arrest may be executed beyond his county, on being indorsed by the sheriff-clerk of the other county.[6]

An arrestment in execution falls by prescription in three years from its date; an arrestment in security does not prescribe until three years, after the period when the debt becomes payable, if the arrestment proceeded on a future or contingent debt, or (it is presumed) after the decree of constitution of the debt, if it have proceeded on a depending action.[7]

The Lord Ordinary, from whose court an arrestment has issued, and during vacation the Lord Ordinary on the Bills,

---

[1] 1 & 2 Vict. c. 114, §§ 1, 8, 9.—[2] Ibid. §§ 1, 9.—[3] E. iii. 6, 3.—[4] Ibid. 54 Geo. III. c. 137, § 2. Maclaurin's Form of Process, 87.—[5] 1 & 2 Vict. c. 114, §§ 16, 17.—[6] Ibid. § 19.—[7] 1 & 2 Vict. c. 114, § 22. 1669, c. 9.

may recall or restrict the arrestment with or without caution, subject to review of the Inner-House.[1] The sheriff, from whom arrestment has issued, may on petition duly intimated, and to which answers are allowed, recall or restrict it on caution or without caution, subject to review of the Court of Session.[2] Arrestment in security being a diligence by which one may seriously affect the credit of another, or may interrupt his business by locking up his floating capital, is under the equitable control of the judge by whom it is issued, who may recall or restrict it, or loose it on security. The debtor will procure a recall if he can show that nothing has happened to render the creditor's chance of being paid, when the debt comes to be due, more precarious than it was; for a person who has contracted with another, content with the prospect he has of getting the obligation fulfilled, is not entitled to increase his chances by taking a security over the debtor's property, or compelling him to find caution. Accordingly the diligence will be recalled, unless it be shown that the debtor has materially sunk in circumstances, or that other creditors are using diligence against him.[3] An arrestment in security will be loosed on caution being given for the value of the property arrested, or (should that exceed the debt) to the extent of the debt.[4] The cautioner's obligation is to give up the property in as good condition as at the time of the loosing, or to pay the amount of its value. If the goods remain where they were arrested, they are still subject to a Forthcoming (*see below, Sect.* 8); and it would appear, that the diligence being held still to exist, the cautioner is not liable for any decrease in value not occasioned by the loosing.[5] If a second arrestment takes place, and renders the loosing ineffectual, the cautioner will be relieved on notice to the previous arrester.[6]

Sect. 7.—*Execution and Effect of Arrestment.*

The arrestment must be executed on the person who holds the debtor's property, by delivering to him a schedule in presence of one witness, who, along with the officer, must be named in, and must sign an execution.[7] Where it is necessary to execute the arrestment on a person absent from the country, it is accomplished by delivery of a schedule at

---

[1] 1 & 2 Vict. c. 114, § 20.—[2] Ibid. § 21.—[3] B. C. ii. 69.—[4] Ibid.—[5] Ibid. 79.—[6] Ibid.—[7] 1681, c. 5. 1699, c. 12. 1 & 2 Vict. c. 114, § 29.

the office of the register of citations.[1] After execution, the person on whom it is used becomes custodier of the property till relieved by recall, loosing, prescription, or decree of forthcoming, and if he part with it, he will be liable in damages.[2] The diligence is personal to him on whom it is executed, and if he die his heir will not be responsible, unless diligence be directed against himself, though, in as far as respects questions between other parties, the arrestment still holds.[3]

The arrestment confers no real right which will enable the arrester to revindicate the property from any third party acquiring it by an onerous transaction and without fraud.[4] A trust-assignee, after an arrestment in his hands, is not entitled to make advances to, or on account of, the truster.[5] An arrestment on a depending action covers the interest of the debt pursued for, and the expenses of the action.[6]

SECT. 8.—*Forthcoming.*

If a debt is arrested, the money is adjudged to the arrester, and if goods are arrested, they are sold for his behoof, through means of an action of Forthcoming. To found this action the debt must have been constituted by decree, or by an obligation registered for execution,* and therefore, if the arrestment be in security,† the decree of a court must have been interponed.[7] The process may be brought before any competent judge within whose jurisdiction the person in whose hands the arrestment has been used resides, and it need not be brought before the same court from which the arrestment has issued.[8] The arrester's debtor, or, as he is generally termed, "The common debtor," viz. the person whose property or debt has been arrested, must be called in the action.[9] The arrester can acquire no better right than the common debtor had, and consequently every defence which the person in whose hands the arrestment is used could plead against the latter, may be pleaded against the former.[10] Where the arrestment has been loosed on caution, the cautioner must be a party to the action.[11]

Vessels.—When a vessel has been arrested, her price is rendered available by a process of sale, followed by a sale by public auction after due advertisement. Where the debt has

---

[1] 1 & 2 Vict. c. 114, § 18.—[2] E. iii. 6, 14.—[3] Ibid. 11.—[4] Ibid. 15. B. P. 2362.—[5] Bank of Scotland *v.* Macdonell, 7th July 1826.—[6] M'Donald *v.* Wingate, 2d February 1825. May *v.* Malcolm, 7th June 1825.—* See above, p. 337.—† See above, p. 469.—[7] St. iii. 1, 36. D. P. 341.—[8] D. P. 341.—[9] Ibid. 342.—[10] Ibid.—[11] Ibid. 343.

not been constituted, conclusions for constituting it may be inserted in the summons, and the constitution and sale proceed in one action.[1]

CHAPTER VII.

Proceedings Against the Estate Heritable.

Sect. 1.—*Inhibition.*

Inhibition is a prohibitory security, by which a species of embargo is laid on the heritable property of a debtor. It is defined as "a personal prohibition, which passes by letters issuing from the signet, prohibiting the party inhibited to contract any debt, or grant any deed, by which any part of his lands may be alienated or carried off to the prejudice of the creditor inhibiting."[2] To make the writ effectual, it must be executed against the debtor, published edictally at the head burgh of the sheriffdom, and recorded in the register of inhibitions within forty days after its publication.[3] Inhibition may proceed on the decree of a court, or on a bond or other obligation which clearly establishes a liquid debt. It may be served on the debtor, during the course of an action for constituting the debt, becoming available when the creditor obtains decree of constitution.[4] Inhibition may proceed on a future or contingent debt, where the creditor has good reason to fear from the debtor's circumstances that his debt will not be paid. Such inhibition, after it has issued, may be recalled at the discretion of the court, on cause shown. Inhibition for a debt actually due cannot be recalled.[5]

Effect.—"This diligence strikes against the voluntary debts or deeds of the inhibited, *i. e.* against all rights granted by him, to which he was not obliged, anterior to the inhibition. Therefore a sale of lands, however onerous, made by the debtor, after publishing the inhibition, or a voluntary security upon land granted by him to a creditor, even after citation upon the diligence, though antecedently to its publication, may be annulled by the inhibiter, suppose

---

[1] D. P. 262, 263.—[2] E. ii. 11, 2.—[3] Ibid. 4.—[4] Ibid. 3.—[5] Ibid. 8. B. C. ii. 144, 146.

that creditor's debt should have been contracted previously to the inhibition."[1] It has to be observed, however, that the inhibition is no transference of the proprietor's rights; it does not affect the validity of any act he may do regarding his estate, it merely gives the inhibiter a remedy against any voluntary alienation or dilapidation, in so far as he may himself be injured by it.[2] It does not affect acts which the debtor has come under a previous obligation to perform.[3] If a proprietor has made a valid and obligatory bargain to sell heritable property, before the inhibition, deeds granted in fulfilment of it are not struck at.[4] Inhibition is in so far personal to the individual inhibited, that to affect the heir it must be specially renewed against him.[5] As to the rights of inhibiting creditors in competition with others, *see above*, p. 360.

SECT. 2.—*Adjudication.*

The legitimate purpose of adjudication is to enable a creditor to attach and convert into money his debtor's heritable estate. It has elsewhere been noticed as a means by which an heir might, in peculiar circumstances, complete his title to his ancestor's estate.* A form termed *Adjudication in Implement* is likewise used to complete a conveyance of property, which is imperfect from its not giving the holder power to make his title real.† The subjects which may be adjudged are, besides landed property and all rights connected with land,—all rights bearing a tract of future time, as Annuities, Pensions, Personal bonds excluding executors or containing a destination to a series of heirs, Tacks, Offices descendible to heirs, and along with these, any moveable property which cannot be arrested, as Royal Bank stock, Patent rights, &c.[6] Copyright was formerly subject to adjudication, but as it is now declared by statute to be personal property,[7] there does not appear to be any legal means of attaching it.

Apprising.—The only means by which heritable property could, at an early period, be attached for debt, was by Apprising. The principle of this process was, that by the verdict of a jury a portion of the land equal in value to the debt should be set aside, and either sold to a third party or made over to the creditor, subject to the right of the debtor to re-demand it on payment of the debt with expenses. This

[1] E. iii. 11, 11.—[2] Ibid. 14.—[3] Ibid. 11.—[4] Livingstone *v.* Macfarlane, 27th July 1842.—[5] B. C. ii. 149.—* See above, p. 103.—† See above, p. 168.—[6] D. P. 397, *et seq.* Jur. St. iii. 329.—[7] 5 & 6 Vict. c. 45, § 25.

system became corrupt. The lands were valued partially, or not at all, the whole estate was made over to the creditor, and as the right of the debtor to redeem his property fell in seven years, large estates were evicted for small sums. These abuses were after partial modification remedied by the act 1672, c. 19, and the system of Adjudication was introduced, by which the property is made over to the creditor, who has to account to the debtor for his intromissions with it.[1]

When an ordinary adjudication is to be raised, it is first necessary that the debt should be liquid or fully due, and if it be not, the decree of a court must be obtained to make it so. In the summons of adjudication, the debtor is in the first place called on to produce the titles of his property, and concur in getting a portion of it valued and set apart for the creditor, amounting to the debt, &c., and a fifth part more in consideration of the creditor taking land instead of money. The part thus assigned is redeemable by the debtor within five years. If the demand is complied with by the debtor, a Special Adjudication takes place.[2] It is however in practice never complied with, for an embarrassed debtor is seldom in a situation to give a good title to any portion of his property, and the shortness of the period for redemption is disadvantageous. The second alternative is, That on the failure of the debtor to agree to the above plan, the lands, &c., mentioned in the summons shall be decreed to be made over to the creditor, liable to be redeemed by the debtor at any time within ten years, on payment of the debt, penalty, and interest.[3] The decree adjudges the lands in conformity, and directs the superior to receive the creditor as his vassal. An Abbreviate, or abridged statement of the contents of the decree is then made, and must within sixty days be recorded in a register kept for the purpose.[4] All the intromissions of the creditor with the estate so adjudged to him, go to the liquidation of the debt.

After the expiry of ten years, or as the period is technically called "the Legal," the creditor may get his redeemable security converted into an absolute right of property, by raising an Action of Declarator of Expiry of the Legal against the debtor. In this action the creditor calls on the debtor to exercise his right of redemption, otherwise it will be judicially declared to be at an end; and on the other hand the debtor may call on the creditor to give an account of his intro-

[1] Jur. St. iii. 324, *et seq.*—[2] 1671, c. 19. Jur. St. iii. 326. D. P. 425.—[3] B. C. i. 704. Jur. St. iii. 327.—[4] D. P. 426.

missions, and may redeem the lands by paying the balance.[1] If no declarator is raised, it would appear that the right of redemption is still open; but if the adjudger have got himself infeft, and has possessed for forty years after the expiry of the legal, he acquires an irredeemable right by Prescription.[2]* After an adjudication is completed, every other adjudication on which decree is obtained within a year and day of the date of the completion, ranks on a par with it. An adjudication is held completed in questions among adjudgers, when the superior is charged to enter the adjudger as his vassal.[3] (*See as to the Ranking of Adjudications above*, p. 360.)

SECT. 3.—*Proceedings against the Estate of a deceased Debtor.*

By entry as heir (*see above*, p. 101), a successor becomes liable for the whole of his ancestor's debts, though they should exceed the value of the estate left. As an exception, an heir who enters in a Burgh tenement by *hasp and staple*,† is only liable to the extent of the property. It is questioned whether the same rule applies to a *precept of Clare constat*.[4]‡ An Heir of Provision is only liable to the extent of the subject destined to him.[5] Heirs have relief among each other. (*See above*, p. 365.)

Charge to Enter.—The heir is entitled to a year and day to consider whether he shall enter on possession of the property, and thereby become answerable for his ancestor's debts. At the end of that period, if he have not made up his mind, any creditor of the deceased may *charge him* to enter heir, the effect of which is either that he enters, and becomes responsible to the creditors, or by not entering leaves the property in their hands. The same means may be used by the creditors of the heir. The charge is a writ issued from the signet, calling on the heir to enter within forty days, with the alternative, that if he fail, the creditor shall have such action against him as if he had entered. In practice the charge is given within the year, but the heir is protected from farther procedure until its expiry. There are three kinds of charge. Where the charger is a creditor of the ancestor, he procures, in the first place, a *general charge*;

---

[1] B. C. i. 705. Jur. St. iii. 333.—[2] Ibid.—* See above, p. 59.—[3] 1661, c. 62. 1672, c. 19. 54 Geo. iii. c. 137, § 11.—† See above, p. 103.—[4] S. H. S. ii. 46.—‡ See above, p. 102.—[5] S. H. S. ii. 48.

the use of this is merely to fix on the heir the character of representative to his ancestor; it is therefore not requisite on the part of a creditor of the heir. Having obtained what is called a Decree of Constitution on this charge, the next step will depend on whether the ancestor was infeft, so that the heir would have required to enter by a special service, or was uninfeft.* In the former case, the creditor executes a *special charge* applicable to the particular lands, and can then adjudge as if they were vested in the heir. In the latter case, a *general special charge* is used, followed up in the same manner as the *special* charge, and enabling the creditor to act as if the heir had procured a general service.[1]

If the heir appear in the action of constitution and renounce the succession, the adjudication which will follow is said to be *contra hæreditatem jacentem*, and has this peculiarity, that it may be pursued before the Sheriff.[2]

Inventory.—An heir who wishes to enter on the estate, without becoming liable for the debts of his ancestor beyond its value, does so by entering *cum beneficio inventarii*—or with the benefit of an inventory. The inventory contains all the heritable subjects left by the ancestor; it is given in on oath, and registered in the county books within year and day of the death of the ancestor, and in the books of Session within forty days after expiry of the year.[3]

An heir may become liable for all his ancestor's debts by any of those acts which are termed *gestio pro hærede*—or behaviour as heir. Among these are entering on or taking possession of any part of the estate after the ancestor's death, by uplifting rents, cutting down timber, &c., and other proceedings by which an intention is shown to act the part of proprietor.[4] Another method by which the heir may become liable is called *præceptio hæreditatis*. It consists in the heir accepting during the ancestor's lifetime part of the estate to which he would have succeeded at his death. He must have been heir at the time of the transaction,—it is not sufficient that he should afterwards turn out to be so. The property must be given him gratuitously. By the *præceptio* he only becomes liable for the debts of the ancestor incurred before its date.[5]

---

* See above, p. 100.—[1] E. ii. 12, 11-14. S. H. S. ii. 11, *et seq.* Jur. St. iii. 362, *et seq.*—[2] D. P. 418.—[3] 1695, c. 24. S. H. S. ii. 51, *et seq.*—[4] E. iii. 8, 82, 83. S. H. S. ii. 56, *et seq.* Montgomerie *v.* Boswell, 20th Dec. 1841.—[5] E. iii. 8, 87, 92. S. H. S. ii. 90, *et seq.*

INDEX.

B.

C.

D.

I.

M.

N.

O.

P.

R.

Y.

THE END.

Printed by Oliver & Boyd,
Tweeddale Court, High Street, Edinburgh.

TWEEDDALE COURT, *April* 1847.

WORKS

PUBLISHED BY

OLIVER & BOYD, EDINBURGH;

AND SOLD BY

SIMPKIN, MARSHALL, & CO., LONDON.

D'AUBIGNE'S NEW WORK—CROMWELL.

THE PROTECTOR: A VINDICATION, by J. H. MERLE D'AUBIGNE, D.D.

One volume 8vo, cloth.

By the same Author,

HISTORY of the REFORMATION of the SIXTEENTH CENTURY, OLIVER & BOYD'S REVISED EDITIONS. Vols. 1, 2, and 3, being the only Translation corrected and authenticated by Dr D'AUBIGNE, to which he has also written a new Preface, and made numerous important Additions not to be found in any other Translation; and Vol. 4, being the English Original.

With Autograph of Dr D'Aubigné.

THE VERY CHEAP EDITION, four vols. in one. Demy 8vo, cloth, 6s.; or 7s. gilt, very suitable for a Present.

THE LIBRARY EDITION, Large Type, in four vols. post 8vo, cloth, price 14s.; or in morocco, elegant, price £1, 10s.

Dr D'Aubigne's Declaration.

Extract from new Prefaces.—"I have revised this translation line by line, and word by word; and I have restored the sense wherever I did not find it clearly rendered. It is the only one which I have corrected. I declare in consequence, that I acknowledge this translation as the only faithful expression of my thoughts in the English language, and I recommend it as such to all my readers."

N. B.—Vol. IV. separately, Demy 8vo, large type, 12s. cloth, and in Medium 8vo, double columns, 3s. 6d. sewed, may still be had.

Works Published by

THE PILGRIMAGE: How God was found of him that sought Him not; or, RATIONALISM in the Bud, the Blade, and the Ear. A TALE FOR OUR TIMES.

Translated from the German of C. A. WILDENHAHN
by MRS STANLEY CARR.

One volume post 8vo, price 7s. 6d. cloth.—*Now ready.*

Contents.

1. THE LESSON.
2. THE FATHER'S GRIEF.
3. THE LETTERS.
4. THE SICK MOTHER.
5. THE MORNING DEVOTION ON THE ILSENSTEIN.
6. THE NEW ACQUAINTANCE.
7. THE PROPOSAL.
8. THE CONSULTATION.
9. THE ROPE-LADDER.
10. THE DISCOVERY.
11. THE GAMING-HOUSE.
12. THE UNEXPECTED MEETING.
13. THE NEW TESTAMENT.
14. THE DAWN OF LIGHT.
15. THE DEEPER PERCEPTION.
16. THE APPROACH TO PEACE.
17. THE POCKET-BOOK.
18. THE JOURNAL.
19. THE WAY OF REPENTANCE.
20. THE PLIGHTED TROTH.
21. THE SECOND RENCONTRE.
22. THE VISIT TO THE CONVENT.
23. THE LAKE OF GENEVA.
24. A POETIC SOIREE.
25. THE EXPIATION.
26. THE RETURN HOME.

DR CHALMERS' WORKS, *greatly Reduced in Price.* 25 Vols. 12mo, Complete. Published at 6s. per Volume.

Reduced Price of Complete Sets, 3s. 6d. each Volume.

Selected Subjects, 4s. each Volume.

Handsomely bound in cloth, new style, and lettered in gold.

Works in the Series.

Natural Theology, 2 vols.
Evidences of Christianity, 2 vols.
Moral Philosophy, 1 vol.
Commercial Discourses, 1 vol.
Astronomical Discourses, 1 vol.
Congregational Sermons, 3 vols.
Sermons on Public Occasions, 1 vol.
Tracts and Essays, 1 vol.
Introductory Essays to Select Christian Authors, 1 vol.
Christian and Economic Polity of a Nation, 3 vols.
Church and College Establishments, 1 vol.
Church Extension, 1 vol.
Political Economy, 2 vols.
On the Sufficiency of the Parochial System, 1 vol.
Lectures on the Epistle of Paul the Apostle to the Romans, 4 vols.

A MANUAL of COMMERCE; being a Compendium of Mercantile Tables; British and Foreign Monies, Weights, and Measures; and the Theory and Practice of Exchange. By WILLIAM WATERSTON, Author of a "Cyclopædia of Commerce," &c. *New Edition.* 12mo, price 3s. 6d. half-bound.

This Work contains very complete Reckoning Tables, from ¼ of a penny to one pound; and full Tables of Compound Interest and Life Annuities have been added to this Edition.

"Waterston's Manual of Commerce contains much valuable information within a very small compass."—*Encyclopædia Britannica.*

"A valuable book of reference for all persons engaged extensively in commercial transactions."—*Westminster Review.*

Oliver & Boyd, Edinburgh.

THE MANUAL of the LAW of SCOTLAND.

New and greatly Enlarged Edition. **Published in separate Volumes, namely,**

THE LAW OF PRIVATE RIGHTS AND OBLIGATIONS. By JOHN HILL BURTON, Advocate. Post 8vo, price 10s. cloth.

PUBLIC LAW: Legislative, Municipal, Ecclesiastical, Fiscal, Penal, and Remedial. With a Commentary on the Powers and Duties of Justices of the Peace and other Magistrates. By JOHN HILL BURTON, Advocate. Post 8vo, price 10s. cloth.

THE PHILOSOPHY of TRADE; or, OUTLINES OF A THEORY OF PROFITS AND PRICES, including an Examination of the Principles which determine the Relative Value of Corn, Labour, and Currency. By PATRICK JAMES STIRLING. Demy 8vo, price 10s. 6d. cloth.

"A very able and elaborate work, well deserving of attention from those who take an interest in the higher branches of political economy."—*Banker's Magazine.*

"We shall greatly mistake the rank or character of this treatise, if we but regard it as a successful exposition of its first and early rudiments for the benefit of those who yet are schoolboys on the subject. It is something far higher than an exposition—it is a rectification of first principles; for the author grapples with some of the first and fundamental doctrines of those who have been esteemed the greatest masters in the science, and, as we think, overturns them. Such are the changes which he advocates on the alphabetic characters (of the science) as lead to different readings and different lessons throughout, and will help onward to the establishment of a different school from any of those which now are most prized and most resorted to."—*North British Review.*

"Many sound observations, well and forcibly expressed, upon the various topics of currency, foreign exchange, &c."—*Dublin University Magazine.*

"The work of an astute and comprehensive mind."—*Literary Gazette.*

LITERARY CHARACTERISTICS of the HOLY SCRIPTURES. By J. M. M'CULLOCH, D.D., Minister of the West Church, Greenock, Author of "A Series of Lessons in Prose and Verse," "A Course of Reading in Science and Literature," &c. &c. *Second Edition,* with Additions and Supplementary Notes. Small 8vo, price 2s. 6d. cloth.

Contents.

"This volume displays a great deal of fine literary taste and critical acumen. The principal features which distinguish the Holy Scriptures, both in their subject-matter and in their style, are strikingly brought out and handled. . . . The statements advanced by the author are calculated, in no small degree, to strengthen a belief in the divine origin of the Bible, and to demonstrate that, even in a literary point of view, it is superior to all other books. Persons of literary taste, and Christians in general, will find much gratification and instruction from a perusal of this talented little work."—*Scottish Herald.*

"So high is our estimate of the book that we scarcely know terms sufficiently strong to commend it. The leading characteristics of the Bible are brought out with a beauty and force seldom equalled."—*Glasgow Examiner.*

"A very pleasing, useful, and valuable composition,—admirable in its object, and conceived and executed in a spirit of cheerful, graceful, and genuine piety."—*Glasgow Citizen.*

"A learned, an able, and a most useful book."—*Aberdeen Banner.*

THE BIBLICAL STUDENT'S ASSISTANT;

containing a List of the Principal Works on Doctrinal and Practical Theology, arranged in the order of the Subjects, with occasional Notes; together with an Index to 4000 Texts of Sermons by eminent Divines. By CLERICUS. Royal 8vo, price 5s. 6d. cloth.

"A manual of no ordinary utility to the theological student, as well as to the parish minister."—*Edinburgh Advertiser.*

A VERSION of the PROPHECIES of EZEKIEL;

retaining, for the most part, in English the same order of Expression which occurs in the Hebrew Original. By the Rev. JAMES M'FARLAN, Minister at Muiravonside. 8vo, price 5s. cloth.

THE COOK and HOUSEWIFE'S MANUAL.

By MISTRESS MARGARET DODS, of the Cleikum Inn, St Ronan's. *Eighth Edition*, containing nearly 700 closely printed pages. Small 8vo, price 6s. 6d., richly bound in cloth.

This Edition has been thoroughly revised, and considerably enlarged by the addition of Receipts in every department; but particularly in the most improved Modes of MODERN ENGLISH and ANGLO-FRENCH COOKERY—Directions for the various Preparations of INDIAN CORN MEAL—Cookery for INVALIDS and CONVALESCENTS—and by Hints and Suggestions in the different branches of Domestic Economy, whether useful or ornamental.

"Mistress Dods has preserved the recipes of certain excellent old dishes, which we would be loath should fall into oblivion in our day."—*Sir Walter Scott.*

"The rapidity with which Meg Dods has run to a second (now an eighth) edition is in no small degree owing to its literary talent."—*Morning Chronicle.*

"One of the best oracles extant for gastronomical consultation."—*Literary Gazette.*

The following is a Selection from the Opinions of the Press on the New Edition.

"The volume is quite fascinating even for general readers. . . All the resources of poverty and of wealth are searched into and displayed, and sound common sense in every instance dictates all the hints and advices."—*Scotsman.*

"Who in Scotland requires to be told of the unrivalled merits of Mistress Meg Dods' book of cookery—scarcely more admirable for the accuracy, simplicity, and taste of its culinary instructions, than for the great literary attractions, the rich vein of character, the broad and caustic humour, which adorn its pages? . . This new edition is so greatly improved as to be superior to all its predecessors. It has undergone a most diligent revision, and has been so carefully adapted to present circumstances that we observe in it a whole multitude of receipts for preparing maize, rice, haricots, and the hundred other things of that kind which the late disappearance of the potato has called into notice."—*Glasgow Constitutional.*

"We strongly recommend to every frugal housekeeper the perusal of the chapter on national cookery, where a list of cheap savoury dishes is given in the form of broths, soups, stews, &c. &c., which, as they contain rice, barley, and such esculents as remain to us, must in some measure supply the place of potatoes, and reduce the consumption of bread at the dinner-table. The receipts are so well selected and so practical that the book ought to become a kitchen oracle, and turned to every-day use. Were it so, we are persuaded that there would be fewer spoiled dinners and perhaps soured tempers, while there would be a proportionate increase in domestic comfort, with little or no addition to the household expenditure. By following Meg Dods' receipts for one week, the mistress of even a moderately large family will save more than the publishing price of her book."—*Glasgow Argus.*

"The work before us has done much to dispel the hereditary notions of culinary operations, and to introduce more rational methods, and the present edition is probably the finest issued."—*Glasgow Examiner.*

"Nothing could surpass this truly excellent work. To housekeepers and all concerned for either cheap or extravagant cookery the volume is invaluable."—*Newcastle Guardian.*

"The present edition of the work may be said to be perfection itself, in so far as the art of cookery is concerned. Here there is nothing wanting."—*Arbroath Guide.*

Works Published by

A DICTIONARY of the ENGLISH LANGUAGE,

containing the Pronunciation, Etymology, and Explanation of all Words authorized by eminent Writers: to which are added, a Vocabulary of the Roots of English Words, and an Accented List of Greek, Latin, and Scripture Proper Names. By ALEXANDER REID, A.M., Rector of the Circus Place School, Edinburgh; Author of "Rudiments of English Composition," &c. *Third Edition.* Large 12mo, price 6s. 6d., neatly and strongly bound, 564 pages.

In this Work, to which the Author has devoted the labour of several years, an attempt has been made to compile a School Dictionary adapted to the present state of the English Language, and to the improved methods of teaching. It contains every word which has been sanctioned by the use of eminent authors, except such as have become obsolete, or are merely technical. While the usual alphabetical arrangement is preserved, the words are at the same time grouped in such a manner as to show their etymological affinity; and after the first word of each group, is given the root from which they are derived. These roots are afterwards arranged into a vocabulary; so that the Dictionary may be used either for reference or for teaching derivation.

"This is the most complete School Dictionary we have yet seen."—*Academic and Collegiate Circular.*

"This work is, beyond dispute, the best of its class that has yet appeared."—*Christian Witness.*

"As a school-book it is superior to any which has yet made its appearance, and there is no doubt that it will quickly supersede the dictionaries at present in use."—*National.*

"Compiled with the most remarkable attention to accuracy, and invaluable for the use of schools."—*Liverpool Mail.*

*** *This Dictionary has been reprinted in the United States of America, where it has been introduced into many public schools.*

STANDARD PRONOUNCING DICTIONARY

of the FRENCH and ENGLISH LANGUAGES. In Two Parts. Part I., FRENCH and ENGLISH. Part II., ENGLISH and FRENCH. By GABRIEL SURENNE, F.A.S.E., French Teacher in Edinburgh, Corresponding Member of the French Grammatical Society of Paris, &c. *Fourth Edition.* Large 12mo, 10s. 6d., neatly and strongly bound, 882 pages.

This Work, on which the author was engaged upwards of six years, presents the advantages of being a French Pronouncing Dictionary, at once suited for the school or the library. It contains not merely the words used in current literature, but also a wide range of terms connected with science and the fine arts, the meaning of which is often vainly sought for in common dictionaries; and at the bottom of every page is printed in alphabetical order a list of historical and geographical proper names. The utmost pains have been taken to render the system of pronunciation adopted both correct and intelligible, and such it is hoped as will enable the pupil, with very little preliminary instruction from the teacher, to pronounce correctly any word in the language.

"A fourth edition speaks the merits of M. Surenne; but it does more, for it exhibits very great painstaking in very marked improvements, especially in the way of pronunciation, the critical rules and examples for which are deserving of the highest praise. The portable size of the work renders it convenient in every way; and we can conscientiously recommend it as an excellent reference for the interpretation and use of the French tongue."—*Literary Gazette.*

"It is accurate, critical, and comprehensive."—*Athenæum.*

"We were led to expect a work of superior merit, but certainly were not prepared for so complete and elaborate a performance as the one before us. Every requisite in a dictionary seems here to find a place."—*Witness.*

*** *This Dictionary has also been reprinted in the United States of America.*